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BENGAL SECRETARIAT LIBRARY.

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

GREENWOOD *v.* SUTCLIFFE.

[1890 G. 1983.]

C. A.
1891
STIRLING, J.
May 7.
C. A.
Nov. 10, 11.

Tender—Conditional Tender—Tender under Protest.

Though a conditional tender is not good, a tender under protest, reserving the right of the debtor to dispute the amount due, is a good tender if it does not impose any conditions on the creditor.

A mortgagor tendered to a mortgagee in possession the balance appearing to be due for principal, interest, and costs, according to an account made out by the mortgagor from documents furnished by the mortgagee, such balance being less than what the mortgagee claimed to be due. The mortgagor stated at the time that he did not admit the correctness of the mortgagee's accounts, and that he intended to take steps to dispute them, and to have the costs taxed. The mortgagee refused to accept the sum tendered. The mortgagor then brought an action to redeem. *Stirling*, J., held that as the acceptance of such a tender would not have prevented litigation, the mortgagee ought not to be deprived of his costs on account of it, and that the ordinary redemption decree against a mortgagee in possession must be made:—

Held, on appeal, that the tender, as it did not impose any conditions on the mortgagee, was a good tender, and that the mortgagor was entitled to accounts, for the purpose of shewing whether it was sufficient in amount, reserving further consideration and costs in case it proved to have been sufficient; the ordinary decree to stand in case the tender was shewn to have been insufficient.

ON the 17th of August, 1882, the Defendants advanced to *Charles Roberts* £4000, on the security of an indenture dated the 17th of August, 1882, made between *Roberts*, of the first part;

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the Plaintiff and her late husband, of the second part; and the Defendants, of the third part. The security was on copyholds, some of which belonged to *Roberts*, and the rest to the Plaintiff, who joined in the security only as surety for *Roberts*. The copyholds were duly surrendered on the same day.

On the 13th of May, 1887, *Roberts* was adjudicated a bankrupt. Very shortly afterwards some buildings on his part of the mortgaged property were burnt down, and the insurance money was applied by the mortgagees in part payment of what was due to them. The mortgagees entered into possession.

On the 3rd of April, 1890, the trustee in the bankruptcy sold and conveyed to the Plaintiff *Roberts's* equity of redemption in his copyholds comprised in the mortgage.

In January, 1890, the Plaintiff's solicitor informed the Defendants' solicitors that the Plaintiff was prepared to pay all interest to the end of 1889. The Defendants accordingly made out an account, shewing that on the 31st of December, 1889, there was due to the Defendants £1975 10*s.* 4*d.* for principal, and £330 9s. 9*d.* for interest. The Defendants alleged that owing to a mistake of their accountant a sum of £59 3*s.* 4*d.*, due for interest up to February, 1887, was omitted, and they also claimed to add a sum of £20 6*s.* 6*d.* to the amount of capital. On the 9th of May, 1890, the Plaintiff paid the Defendants £330 9*s.* 9*d.* for interest, and the Defendants gave a receipt for it as received on account of interest.

In July, 1890, the Plaintiff expressed her readiness to pay off what was due on the mortgage. In September, 1890, the Defendants sent in an account, shewing £2473 7*s.* 8*d.* due to them on the 26th of that month. The Plaintiff's solicitor objected to it, and the Defendants sent in another, but no agreement was come to. The Plaintiff alleged that the account sent in by the Defendants, in which the £59 3*s.* 4*d.* was omitted, amounted to a representation on the faith of which the Plaintiff had acted in the arrangements with *Roberts's* trustee in bankruptcy, and that the Defendants were bound by it not to claim the omitted sum. Ultimately, at the hearing before Mr. Justice *Stirling*, the Plaintiff gave up this point. The Plaintiff also complained of the amount of costs, alleging that many of the

expenses were unnecessary. On the 30th of September the Plaintiff's solicitor called on the Defendants' solicitor with the following account:—

1889.	£	s.	d.	1890.	£	s.	d.
Dec. 31. To balance of principal as per statement . . .	1975	10	4	May 10. By cash for interest. . .	330	9	9
To balance of interest to this date as per statement . .	330	9	9	Sept. 30. By balance carried down . .	2136	2	7
1890.							
Sept. 30. To interest on balance of principal from Jan. 1, 1890, to date (inclusive), less £1 17s. tax . .	72	4	8				
To costs . . .	88	7	7				
	£2466	12	4		£2466	12	4

The Plaintiff's solicitor then tendered £2136 2*s.* 7*d.* The Defendants' solicitors refused to receive it, but wrote at the foot of the account, and signed the following memorandum:—

"Without admitting the correctness of this account, we admit tender and refusal of £2136 2*s.* 7*d.*

"*W. & G. Burr & Co.*"

The Plaintiff took out an originating summons, asking for an order that an account might be taken of what, if anything, was due on the mortgage for principal, interest, and costs, other than the costs of this action, and to redeem the property, and that the Defendants might be ordered to pay the costs of the action.

The Plaintiff's solicitor, by affidavit, stated that he tendered the £2136 2*s.* 7*d.*, "duly and unconditionally." One of the Defendants' solicitors deposed that the Plaintiff's solicitor had expressly said at the time that the tender "was not unconditional, but was subject to reopening of the matter, and to subsequent taxation of the costs, and to revision of the other figures appearing in the said account." Another member of the firm who was present deposed that the Plaintiff's solicitor in making the tender stated that he should take steps to open the figures appearing in the account rendered by the Defendants, as to

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principal, interest, and costs, and that the tender was expressly made subject to such revision.

The summons was adjourned to be heard in Court by *Stirling*, J. Mr. *Creeke*, the solicitor who made the tender, and Mr. *Burr*, one of the Defendants, and a member of the firm of solicitors who acted for them, were orally cross-examined on their affidavits. Mr. *Creeke* deposed that he said before making the tender, "I must now make a tender; but before I make it we must dismiss all the conversation that has taken place, because my tender is to be unreserved and unconditional." He went on to say, "I took the money out of my pocket, and produced the account, and I said, 'I tender you unreservedly and unconditionally the balance brought down.' Mr. *Burr* said, 'You need not count the money; I admit it.'" He admitted that afterwards, on leaving, he was asked, "Then you admit all these figures you have made out?" and replied, "No; I should certainly take steps to have it rectified." He admitted that before the actual tender of the money he had stated his intention to have the costs taxed, and he said that this was his intention throughout.

Mr. *Burr* was desired by the Court to repeat as nearly as he could recollect what took place when the tender was made. He said, "Mr. *Creeke* produced this account, at the same time taking from his pocket a small bag. He stated that he wished to make a tender. Those were his words, to the best of my recollection, 'I wish to make a tender.' He produced two copies of the account, and he asked me to sign a memorandum acknowledging the tender. I looked at the account, which I had not previously seen. I said, 'Am I to understand that if I take this sum of £2136 2*s.* 7*d.* it settles the matter?' He said No; he reserved his right of taxing the costs and of reviewing the figures. I then signed the memorandum, and I said I would mention the matter to my co-Defendant." He did not admit that Mr. *Creeke* had said anything about the tender being unreserved and unconditional.

The action was heard before Mr. Justice *Stirling* on the 7th of May, 1891.

Wheeler, Q.C., and *E. S. Ford*, for the Plaintiff:—

The tender was unconditional, and, if it is sufficient, the

Plaintiff is entitled to an order in the form usual in cases where a tender has been proved: see *Seton* on Decrees (1).

Hastings, Q.C., and *Butcher*, for the Defendants:—

The tender made by the Plaintiff in this case was not an unconditional one. It was accompanied by a reservation of the right to have the costs taxed, and to raise the question whether the amount tendered was not more than enough. This is, therefore, not a litigation rendered necessary solely by our refusal of the tender, but an ordinary redemption action, and the mortgagees are entitled to their costs under the general rule.

[*Leake* on Contracts (2) and *Chitty* on Contracts (3) were also referred to.]

STIRLING, J.:—

The question which I have now to decide is how the costs in this redemption action are to fall. I need scarcely say that as a general rule a mortgagee is entitled to his principal, interest, and costs, and, in order to deprive him thereof, a case must be made out for the purpose. It is contended here that a tender of the sum due was made in such a way that the mortgagee was not justified in refusing it; and that, by his refusal, he produced this litigation. Now *Harmer* v. *Priestley* (4) is a case in which it was held in equity that the refusal of an unconditional tender was a sufficient ground for depriving a mortgagee of the costs of a subsequent suit for redemption. In that case Sir *John Romilly*, M.R., said (5): "The question raised is, whether the usual decree for redemption is to be made or a special direction is to be given as to costs, in consequence of the tender made to the defendants by the plaintiffs. The circumstances connected with the tender to the mortgagees, about which there appears to be no dispute, are these: the plaintiffs, being desirous of disposing of the property, proposed to pay a gross sum of money, and wait for a settlement until the account was rendered; and they accordingly, after some correspondence, actually tendered to

(1) 4th Ed. p. 1040.
(2) Page 858.
(3) 12th Ed. pp. 791, 792.
(4) 16 Beav. 569.
(5) 16 Beav. 570.

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the defendants £570, the sum considered to be then due; this the defendants declined to receive." Then the Master of the Rolls discusses the case, and, finally, says this: "A mortgagee is, no doubt, favourably looked on by the Court; but he will not be allowed, by disputing the account, to throw the expenses of an unnecessary litigation upon the mortgagor." The question here is, whether this was unnecessary litigation?

Now, under the circumstances, can I come to that conclusion? There is unfortunately a difference between the professional gentlemen who have appeared before me as to the circumstances of this interview. Mr. *Creeke*, who gave an account which I have no doubt he believed to be true, says this, that at a certain stage, after a discussion had taken place between the parties, he said: "I must now make a tender; but before I make it we must dismiss all the conversation that has taken place, because my tender is to be unreserved and unconditional. I took the money out of my pocket, and produced the account, and I said, 'I tender you unreservedly and unconditionally the balance brought down.' Mr. *Burr* said, 'You need not count the money; I admit it.' Then Mr. *Burr* made some remark." I have before me the account, which was produced on the occasion, with a note signed by Mr. *Burr*. "Without admitting the correctness of this account, we admit tender and refusal of £2136 2*s.* 7*d.*" Now, the account which was given by Mr. *Burr* was given to myself in answer to a request that he should state exactly according to his view what occurred. It is this: "Mr. *Creeke* produced the account, taking from his pocket a small bag. He stated he wished to make a tender. He said, to the best of my recollection, 'I wish to make a tender.' He produced two copies of the account, and he asked me to sign a memorandum acknowledging the tender. I looked at the account, which I had not previously seen. I said, 'Am I to understand that if I take this sum of £2136 2*s.* 7*d.*, it settles the matter?' He said, No, he reserved his right of taxing the costs and of revising the figures. I then wrote the memorandum and said I would mention the matter to my co-Defendant."

Now, in the first place, I have got the task of deciding which of these versions I ought to prefer, and undoubtedly I give the

preference to Mr. *Burr's*. I think it is more in accordance with the probability of the case, because Mr. *Creeke*, in the course of his cross-examination, very candidly said he throughout intended to have the costs taxed, though he said nothing about it at the time he made the tender. Of course, he could not get the costs taxed after payment except under special circumstances, and it does seem to me that his evidence throughout was that the litigation between the parties, or the investigation of the accounts, should not be put an end to by what was done on that day. Taking that view, the question I have to ask myself is, Is this an unnecessary litigation? and it seems to me that I cannot hold it to be so, because it was never meant by Mr. *Creeke* to be an end of the matter, but that the account in some shape or form should be judicially investigated subsequently to the tender of this amount under the circumstances which I have mentioned.

I do not go into the question of whether this can properly be called a conditional or an unconditional tender. Those are terms which, perhaps, under the circumstances are not strictly applicable. The real point which I have to consider is, Was this tender made under such circumstances that I can hold that the litigation which has taken place between the parties is unnecessary? I think, under the circumstances, that it was not, and that no ground is made out for depriving the mortgagees of their costs.

W. W. K.

The common decree for redemption against a mortgagee in possession was therefore made, giving the mortgagees their costs of suit. The Plaintiff gave notice of appeal from this order, asking that it should be varied by inserting a declaration that on the 30th of September, 1890, a good tender of £2136 2*s.* 7*d.* for principal, interest, and costs, was made by the Plaintiff to the Defendants, and that accounts should be taken (1.) of what on the 30th of September, 1890, was due to the Defendants for principal and interest in respect of their mortgage, and for such (if any) costs, charges, and expenses as were secured thereby, or as they were entitled to under their mortgage (such costs, charges, and expenses to be taxed by the taxing-master), after

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deducting therefrom the amount found to have been received by the Defendants under the next-mentioned account, and (2.) of the rents and profits received by the Defendants or which but for their wilful neglect or default might have been received up to the 30th of September, 1890. And in case it should appear that the amount due to the Defendants on the 30th of September, 1890, after deducting the rents and profits, did not exceed £2136 2*s.* 7*d.*, then adjourn further consideration and the costs of the action. But if it should appear that the amount due to the Defendants on the 30th of September, 1890, on the said account after deducting the rents and profits, exceeded £2136 2*s.* 7*d.*, then that the accounts directed by the order under appeal might be proceeded with.

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The Plaintiff appealed. The appeal came on for hearing on the 10th of November, 1891.

Wheeler, Q.C., and *E. S. Ford*, for the appeal:—

Mr. Justice *Stirling* says he does not decide whether there was a good tender, but we contend that it was incumbent on him to decide it, for that otherwise the proper form of order could not be determined, and he has in fact held the tender to be bad. We say that it was good, as it imposed no condition. There was only a reservation of existing rights, and this does not make a tender bad. *Scott* v. *Uxbridge and Rickmansworth Railway Company* (1) is precisely in point, and *Sweny* v. *Smith* (2) proceeds on the same principle. If the tender was duly made, then the Plaintiff is entitled to an account to ascertain what was due when it was made, so as to ascertain whether it was sufficient in amount. If it was sufficient, no further accounts are required, for the interest will stop from that date, and the Court can on further consideration dispose of the case. If it was insufficient, then the accounts directed by the decree as it stands must go on. The proper form of decree in the case of a tender being duly made is given: *Seton* on Decrees (3). *Harmer* v. *Priestley* (4) shews the effect of a sufficient tender upon the costs of the suit.

(1) Law Rep. 1 C. P. 596.
(2) Ibid. 7 Eq. 324.
(3) 4th Ed. p. 1040.
(4) 16 Beav. 569.

Hastings, Q.C., and *Butcher*, for the Defendants:—

The substantial dispute between the parties has arisen from the contention of the Plaintiff that the account rendered by the Defendants in the early part of 1890 was a representation by the Defendants as to the amount due for interest at the end of 1889, by which the Defendants are bound, and therefore cannot claim the £59 3*s.* 4*d.* This contention was never given up till the trial before Mr. Justice *Stirling*, and the Defendants ought not to lose their costs, the litigation having in fact been occasioned by this claim, which was ultimately given up as untenable.

[LINDLEY, L.J.:—If there was a tender duly made without any condition, is not the Plaintiff entitled to have it ascertained whether it was sufficient? The costs of the action will not necessarily follow the result of that inquiry, though it will have an important bearing on them. The alteration which the Plaintiff asks leaves the question of costs open in case the tender is found sufficient.]

The question as to costs was the main subject of dispute before Mr. Justice *Stirling*, and if it is left open, we do not argue the case further.

LINDLEY, L.J.:—

In this case the appeal is by a mortgagor, who has brought an action to redeem. Mr. Justice *Stirling* has pronounced the ordinary judgment for redemption. The Appellant asks for the insertion of words to the effect that she made a valid tender to the mortgagees on the 30th of September, 1890, and for some other consequent additions to the judgment. Her object, of course, is this, that if she is right, and if she tendered enough, the interest will stop, and the fact of her having made such a tender will have a very serious bearing on the costs of the suit, although I do not say that it will determine the question of costs, because there may be other matters which the learned Judge may have to take into account. The controversy in this appeal is whether there was or was not on the 30th September, 1890, a valid tender of £2136 2*s.* 7*d.* The learned Judge has declined to insert in the judgment any declaration to the effect

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that there was a valid tender, and, as I understand his judgment, it proceeds upon the ground that although there was a tender it was a tender reserving to the person who made it the right to tax the mortgagees' costs, and also to review their account, they having been mortgagees in possession. The learned Judge thought that this was not a valid tender in point of law, and there I think he made a mistake. I do not see the difference between a tender of that kind and such a tender as was made in the case of *Scott* v. *Uxbridge and Rickmansworth Railway Company* (1), where the tender was in this form: "If you insist upon being paid the amount demanded before satisfactory explanations have been given, our clerk will hand you a cheque this morning for the amount (£1596 3*s.* 6*d.*), but you must consider the payment as under protest, and our client will seek to recover back what is overpaid afterwards." That tender was held to be sufficient.

What is the object of a tender? It is not necessarily to put an end to all controversy. It may have that effect, and very often has, but its main object is to throw the risk of further controversy upon the other party. There being controversies between the Appellant and the Respondents, the Appellant made this tender in order to throw upon the Respondents the risk of refusing to accept that sum as sufficient to cover their demands. The Appellant was quite right in making that tender. She did make it, not conditionally, not throwing any burden upon her opponents, but as a fair and valid legal tender, and that is in fact admitted by the gentleman, not a layman, but a solicitor knowing what a tender means, who signed the following memorandum: "Without admitting the correctness of this account, we admit the tender and refusal of £2136 2*s.* 7*d.*"

I think, therefore, that the Appellant is right, and is entitled to have the judgment varied in the way asked by the notice of appeal. As the Appellant is right, the proper order will be to give her her costs of the appeal in any event.

BOWEN, L.J.:—

I am entirely of the same opinion, and I should regard it as

(1) Law Rep. 1 C. P. 596.

remarkable if the law was supposed to be unsettled on the question of tenders. A conditional tender is not an effectual tender in law, but a tender under protest is quite right. A man has a right to tender money reserving all his rights, and such a tender is good, provided he does not seek to impose conditions. I agree with the judgment of the Lord Justice.

KAY, L.J., concurred.

Solicitors: *Godden & Creeke*, agents for *Creeke & Son, Burnley*; *Ullithorne, Currey, & Villiers*, agents for *W. & G. Burr & Co., Keighley.*

H. C. J.

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Will—Determinable Life Interest—"Become payable to some other person"—Receiving order—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 54, 70.

A testator bequeathed the income of his residuary estate to his son during his life, or until he should assign or dispose of the income or some part thereof, "or become bankrupt, or do or suffer something whereby the said income if belonging absolutely to him, or some part thereof, would become payable to or vested in some other person." In October, 1890, a petition in bankruptcy was filed against the son, and in November, 1890, a receiving order was made. A meeting of creditors was held in December and adjourned till January, when it was adjourned again, and nothing further had been done in the matter:—

Held (affirming the decision of *Chitty*, J.), that though the income did not vest in the official receiver, it would, by force of the receiving order have become payable to him if it had belonged absolutely to the tenant for life, and that the interest of the tenant for life had determined.

E. J. SARTORIS, by will, dated the 19th of July, 1887, gave his residuary real and personal estate to trustees upon the usual trusts for conversion and investment, and directed them to pay the income to his son, *A. C. F. Sartoris*, "during his life or until he shall assign, charge, or otherwise dispose of the said income or some part thereof, or become bankrupt, or do or suffer something whereby the said income, if belonging absolutely to him,

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or some part thereof, would become payable to or vested in some other person (which of the said events shall first happen)." And the testator directed that if the trust should determine in the life of his said son then the trustees should, during the remainder of his life, apply the income for the benefit of all or such one or more exclusively of the other or others of the testator's said son and his wife and issue for the time being in such manner in all respects as the trustees should in their discretion think fit. The testator directed, that while the son was in receipt of the income he should make a sufficient allowance to his (the son's) wife for the maintenance of herself and the maintenance and education of his children by her, the amount to be fixed by arrangement between him and the trustees.

The testator died in November, 1888. The wife's allowance was fixed at half the income of the residuary estate. The whole income was estimated at about £6000 a year.

On the 28th of November, 1890, a receiving order in bankruptcy was made against the son on a petition filed on the 28th of October, 1890, in the district of the *Hampshire* County Court.

The first meeting of creditors was held on the 29th of December, 1890, and adjourned to the 26th of January, 1891, when it was again adjourned, and nothing further had yet been done in relation to the bankruptcy proceedings.

The trustees of the will took out an originating summons against the son and his wife and children, and the official receiver in bankruptcy of the *Hampshire* district, to have it decided whether the trust in favour of the testator's son had determined, and whether the discretionary trust had come into operation, and if so from what date.

The summons was adjourned into Court, and came on before Mr. Justice *Chitty* on the 9th of June, 1891.

Ashworth James, for the trustees:—

This is a carefully drawn clause; the words on which the trustees rely are "payable to." By the receiving order the income has become payable to some other person, *i.e.* the official receiver, and the discretionary power of the trustees comes into operation.

L. H. Jenkins, for Mrs. *Sartoris*:—

Under the *Bankruptcy Act*, 1883, the debtor's property does not vest in the official receiver; but it is equally clear that any income he is entitled to becomes payable to the receiver, and by r. 325 the receiver is authorized to make a subsistence allowance to the debtor. Presentation of a petition under the *Bankruptcy Act*, 1869, has been held to be a "parting with" the income, and to have worked a forfeiture under a similar clause: *In re Amherst's Trusts* (1).

[He also cited *In re Detmold* (2) and *Re Broughton* (3).]

Woolf, Q.C., and *Ringwood*, for *A. C. F. Sartoris*:—

Sects. 9 and 70 of the *Bankruptcy Act*, 1883, do not give to the official receiver any right to the debtor's property, so as to divest the debtor's interest therein and work a forfeiture. There is no divesting until adjudication. A receiver is not even in the position of a creditor entitled to present a bankruptcy petition. *In re Sacker* (4); *Rhodes* v. *Dawson* (5), shew that a receiving order does not divest the debtor of his property. *Ex parte Dawes* (6) is in our favour, and again in *Re James* (7), though there was a bankruptcy, still the right to receive the income, in that case, was held not to have vested in any other person. Payable to, or vested in, mean the same thing. On these authorities we contend that there has been no forfeiture.

James, in reply.

CHITTY, J. (after stating the question raised for his decision and the facts, continued):—

Now the first point to be ascertained is, the effect of a receiving order under the *Bankruptcy Act*, 1883. The material sections are the 9th, which provides that "on the making of a receiving order, an official receiver shall be thereby constituted receiver of the property of the debtor," and the 70th section, which

(1) Law Rep. 13 Eq. 464.
(2) 40 Ch. D. 585.
(3) 57 L. T. (N.S.) 8.
(4) 22 Q. B. D. 179.
(5) 16 Q. B. D. 548.
(6) 17 Q. B. D. 275.
(7) 62 L. T. (N.S.) 454.

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defines his duties. Sub-sect. 2 is the more material one, which enacts that for the purpose of his duties as interim receiver, "the official receiver shall have the same powers as if he were a receiver and manager appointed by the High Court." Upon the Act of Parliament it is quite clear that the debtor's property does not pass to the receiver; but it is equally clear that it is the duty of the receiver to execute his office, and to receive whatever property the debtor may have. If there is property in the debtor's possession, the receiver intervenes by taking possession for the purposes of protecting the property, and seeing that it reaches its ultimate destination, whatever that may be, according to the result of the bankruptcy proceedings. It being plain that there is no vesting of the debtor's property in the receiver, it follows, and has been decided, that notwithstanding the receiving order the bankrupt alone can bring actions for the recovery of property not in his possession, as for instance a debt due to him at law. In the case of *Rhodes* v. *Dawson* (1), where the Court of Appeal was considering this question, Lord Justice *Lindley* said (2): "What the plaintiff" (that is the debtor) "recovers in the action is his property both legally and equitably, although he must, when he recovers it, hand it over to the official receiver for the benefit of his creditors if he does not pay or compound with them." He must hand it over to the official receiver, and then the property will abide the event. It may have to be returned to the debtor, or it may have to be handed over to the trustee in bankruptcy, if a trustee in bankruptcy shall be appointed. Of course the receiver has no beneficial interest himself in what he receives. The reference in the Act of Parliament to a receiver appointed by the Court, shews very plainly what is the intention and effect of the legislation. A receiver appointed in an action, is to take care of, and receive the property which is put under his charge. He is not at liberty, and is not entitled, to bring an action in his own name; the reason being, that he has no property vested in him; and if a receiver is appointed for the purpose of getting in outstanding estate, and those in whose hands the outstanding estate is, decline to pay him, it is generally necessary that an action should

(1) 16 Q. B. D. 548. (2) 16 Q. B. D. 554.

be brought, and where the action has to be brought, it is not brought in the name of the receiver, but in the name of the party to the action who has the legal or equitable title on which the action is founded. I consider these points to be clear.

Then in order to ascertain fully the position of the receiver I will refer to some of the General Rules of 1888, though they do not carry the matter one way or the other much further. The rules that I refer to are 205, 208, and 325. The Court under rule 205 will not approve of a composition unless it is satisfied, on the report of the official receiver, that provision has been made for payment of all proper costs, charges, and expenses of and incident to the proceedings, and the fees and percentages payable to the official receiver. Those costs and those fees may, of course, be provided for out of some funds other than those which are under the charge of the receiver, but it seems plain that what the receiver has in his hands is not taken away from him, until either out of that, or some other fund, these costs and fees are paid. Rule 208 is to the effect that where a composition or scheme is approved of, the official receiver shall forthwith put the debtor, or, as the case may be, the trustee under the composition or scheme, into possession of the debtor's property, and the Court will then rescind the receiving order; so that under that rule, the receiving order is rescinded when the events which are there mentioned happen. That rule should be read in connection with the 205th rule for the purposes of the matter which is before me. The 325th rule is an important one, because subject to any general or special directions which the Board of Trade may give, the official receiver, while in possession of the property of the debtor, may make him such allowance out of his property for the support of himself and his family as may be just. So that with regard to the funds in the hands of the receiver, he has the power of applying a just amount for the support and maintenance of the debtor and his family. Still, as I said a few moments ago, these rules do not in substance vary the position of the receiver under the Act, but I have read them merely because they are supplementary to, and assist, to a certain extent, in ascertaining his position. Now it is clear that a receiver of the Court under an ordinary appointment,

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and the official receiver acting under the bankruptcy jurisdiction, can not only receive, but can give a good discharge to any person who thinks fit to pay him any part of the outstanding estate or property of the debtor.

Having thus ascertained the effect of a receiving order, I proceed to ascertain the true meaning of the testator according to the clauses in his will. I was told by counsel for Mr. *Algernon Sartoris* that in construing clauses of this kind the Court ought to adopt a benevolent view of the clause—benevolent, that is to say, to the person whose life interest is to cease under the clause; and it is said that the clause ought to be construed strictly, which is another mode of expressing the same thing. In my opinion neither of these phrases is useful or proper. I think it is the duty of the Court to read the testator's language and ascertain from what he has said what he means, and if his intention is properly expressed and lawful, to give effect to it. It is to be remembered, though it seems to have been forgotten or probably passed by as an inconvenient topic by the Counsel who were arguing for Mr. *Sartoris*, that he is not the sole object of the testator's bounty, but there are under this clause other persons who are equally the objects upon whom the testator intends to confer a benefit. This clause, like many others that I have had before me, is really to the effect that the income shall be possessed by a certain person until the happening of a certain event, and after the happening of that event it shall be paid to some other person. Where the events are events which the law allows, the right way is to read the clause attentively, and to ascertain from the clause itself what the testator means. The testator says that the income is to go to his son during his life, or until he shall assign, charge, or otherwise dispose of the said income or some part thereof, or become bankrupt, or do or suffer something whereby the said income if belonging to him absolutely, or some part thereof, would become payable to, or vested in, some other person, whichever of the said events should first happen; and if the trusts hereinbefore declared should determine in the lifetime of Mr. *Sartoris*, then during the remainder of his life, on trusts, which may be shortly described as trusts for the benefit of himself, his wife, and his children

under an exclusive power—that is, the power given to trustees under which they may apply the income for the benefit of any one or more of the objects—a power in their absolute discretion. The material words in this case are "do or suffer something whereby the said income, if belonging absolutely to him, or some part thereof, would become payable to or vested in some other person." It was argued that there was no distinction between the words "payable to" or "vested in." In my opinion that argument cannot be maintained. This will was made in 1887, and it is not the practice or the duty of the Court to attribute to any testator ignorance of the law unless there is something in the will to justify it. In this case it appears to me that the testator has endeavoured to express himself accurately, and I have no right to say that the two phrases that he has used, that is, "payable to" or "vested in," are identical in meaning, unless I can find some sufficient ground for so doing. The history of these clauses is well known. Those who assist testators in framing them become aware from time to time of decisions, and if they find that new cases arise and the old forms are insufficient to meet the event, which is intended to be the event, testators come with the assistance of those learned in the law by degrees, as we see, to draw these clauses more and more carefully. This clause on the face of it is carefully expressed, and I am not at liberty to reject the words "payable to."

Now, that being my view of the construction of the clause, the question is, has the income or some part thereof become "payable to" some other person than Mr. *Sartoris*? It appears to me that there is only one possible answer to that question. First, the income from the time at which it was in the hands of the trustees up to the present time has not been payable to Mr. *Sartoris*. I will accept the argument that Mr. *Sartoris* can sue for it: but that does not conclude the matter. If any action has to be brought, who is the person to whom it has become payable? It has become payable, in my judgment, to the official receiver by virtue of his office. I agree that this is not the same case as where a receiver is appointed by way of equitable execution, because where the plaintiff is himself appointed, in such a case as that, he has not only the right to receive, but he has the right to

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retain for his own benefit, any portion of the judgment debt. But I think that in any case where, as against the person entitled otherwise to receive the money, a receiver has been appointed in an action, or where the official receiver is appointed to receive, the effect is that the income, or the money, whatever it may be, has become "payable to" that officer. I was told that the main object of clauses of this kind was to provide for personal enjoyment by the legatee himself. I do not dissent from that as a general proposition, but one has to read these clauses themselves, and to see how they are expressed. Now, personal enjoyment is not mentioned; but I adopt that argument in favour of Mr. *Sartoris*, and deal with it from what appears to me to be the right point of view. During this period of eight months, the event has happened which has deprived him of the personal enjoyment of this income. If some time hence this receiving order should be discharged, he will not in the meantime have had that which, according to this argument, the clause was intended to effectuate, namely, the personal enjoyment. It may be that the order will never be discharged, or it may be rescinded years hence. Then if this clause in the will does not operate, the effect will be that for the period of time, whatever it may be, Mr. *Sartoris* will have been deprived of the personal enjoyment of the income of the fund, and it is not difficult to see the reasons for the course taken at the meeting of the creditors; because the longer the time for which it is left open, the larger will be the amount which, if the Court should not hold that the interest has ceased, will belong to the debtor, and be applicable to the payment of his debts. Then during this period of time the receiver can take a just and reasonable portion of the income, and apply it to the maintenance of the debtor and his family. That is not a right in the debtor himself, but it shews to what extent he will be deprived of the property itself. No doubt it goes for his benefit, because the maintenance of the family may be considered as being for his benefit; but his ownership, his complete dominion over the income, will have been in such an event impaired. I think, considering this clause fairly, giving effect to the lawful intention clearly expressed, it is my duty to hold that the event has happened upon which the income has gone over.

It is not necessary for me to go through the authorities that have been cited. I will mention, however, *Re James* (1), before Mr. Justice *Kekewich*. There the words were, "vested in or payable to some other person." The event which was relied on for the purpose of shewing that the income had gone over was a Scotch sequestration, and the Lord Advocate, for the assistance of the Court, on the matter of fact as to Scotch law, stated his opinion of what that law was. I need not stay to state it, because I find in Mr. Justice *Kekewich's* judgment a clear summing up of what the effect of it was. "I ground," says the learned Judge, "my decision simply on this, that the right to receive the income never became vested in any other person." Mr. Justice *Kekewich*, therefore, was not called upon to make any distinction between the words "vested in" or "payable to," because he held that the right to receive, which is another form of expressing "payable to," had not passed away from the person primarily entitled to receive the income under the will. The other authority to which I refer is *Ex parte Dawes* (2); but that is plainly distinguishable because the only word there was "vested," and the clause did not contain the words "payable to;" it is clear that no property "vests" in the official receiver.

For these reasons I hold that the event has happened on which the life interest of Mr. *Sartoris* has determined, and that the income that is now in the hands of the trustees (which would include anything that by anticipation they may have) is subject to the discretionary trust over. I may add that one thing is clear, that the clause does not relate to the whole income only, but to any part, and if any part had to be retained by the receiver for his costs, or any part is applied according to rule 325, that that would clearly work the forfeiture—or, to express it more accurately, the cessation—upon another ground.

W. C. D.

C. A.

The son appealed from this decision. The appeal was heard on the 11th of November, 1891.

Woolf, Q.C., and *Ringwood*, for the appeal:—

The operation of a receivership order depends on the *Bankruptcy*

(1) 62 L. T. (N.S.) 454. (2) 17 Q. B. D. 275.

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Act, 1883 (46 & 47 Vict. c. 52). By sect. 5, if a debtor has committed an act of bankruptcy the Court may, on the presentation of a bankruptcy petition, make a receiving order for the protection of the estate. Sect. 9 enacts that on the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor. Sect. 10, sub-s. 1, authorizes the appointment of an interim receiver before a receivership order is made, and enables the Court to direct him to take immediate possession of the property of the debtor or any part thereof. Sect. 20 provides for making the debtor bankrupt after a receivership order has been made, and when he is made bankrupt his property is to vest in a trustee. Sect. 54 provides (1.) that until a trustee is appointed the official receiver shall be the trustee for the purposes of the Act, and immediately on a debtor being adjudged bankrupt the property of the bankrupt shall vest in the trustee; (2.) that on the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed. By sect. 70, sub-s. 1, it is the duty of the official receiver, *inter alia*, pending the appointment of a trustee, to act as interim receiver of the debtor's estate, and, where a special manager is not appointed, as manager thereof; and sub-s. 2 provides that for the purpose of his duties as interim receiver or manager he shall have the same powers as if he were a receiver and manager appointed by the High Court. It is clear that under these enactments no property is vested in the receiver, and we contend that they do not make any money payable to him. He could not sue for it in his own name: *Rhodes* v. *Dawson* (1). Money ordered to be paid to a receiver is not owing to him so as to make him a good petitioning creditor: *In re Sacker* (2). If the official receiver got this money he would hold it, not as his own, but for the benefit of the persons who should become entitled to it, and it would not be held for the benefit of the creditors unless bankruptcy supervened. If the debtor made a composition with his creditors the money in the hands of the receiver would belong to the debtor. The case of *Ex parte Dawes* (3) bears in our favour, and in *Re James* (4), it was held that a Scotch sequestra-

(1) 16 Q. B. D. 548.
(2) 22 Q. B. D. 179.
(3) 17 Q. B. D. 275.
(4) 62 L. T. (N.S.) 454.

tion did not, within the meaning of a clause similar to that in the present case, make the income "payable to" some other person. The Court of Bankruptcy no doubt, in a case like the present, could interfere to prevent the property, which may become the property of the creditors, from being wasted; but the only way in which the receiver could enforce payment would be by obtaining leave to sue in the name of the debtor, and until something is done the money remains payable to the debtor, not to the receiver, and the trustees might safely pay the income to the debtor.

L. H. Jenkins, for the son's wife and children, was not called upon.

Ashworth James, for the trustees.

LINDLEY, L.J.:—

In this case we have to consider the meaning of a clause by which the testator directs his trustees to pay the income of his residuary estate to his son, *A. C. F. Sartoris*, "during his life, or until he shall assign, charge, or otherwise dispose of the said income, or some part thereof, or become bankrupt, or do or suffer something, whereby the said income, if belonging absolutely to him, or some part thereof, would become payable to or vested in some other person." The son has not assigned, charged, or disposed of the income, or any part of it, and he has not become bankrupt. The question is whether he has suffered anything whereby the income, if belonging absolutely to him, would have become payable to or vested in some other person.

On the 28th of October, 1890, a bankruptcy petition was presented against the son, and on the 28th of November a receiving order was made. A meeting of creditors was held on the 29th of December, 1890, and was adjourned to the 26th of January, 1891. On that day it was again adjourned, and nothing further has been done in the bankruptcy proceedings. The receiving order, therefore, is still subsisting, and the question is whether the income is still payable to the son.

The effect of a receiving order depends on the *Bankruptcy Act*,

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1883 (46 & 47 Vict. c. 52), s. 9, which authorizes the Court after the presentation of a bankruptcy petition and before bankruptcy to make a receiving order for the protection of the estate, and sect. 70 provides that it shall be the duty of the official receiver, pending the appointment of a trustee, to act as interim receiver of the debtor's estate, and that for the purpose of his duties as interim receiver he shall have the same powers as a receiver appointed by the High Court. It is urged that this does not vest any property in him, and that is true. The difference between a trustee in whom property is vested and a receiver in whom it does not vest is pointed out in *Rhodes* v. *Dawson* (1). But it does not follow, because the order does not vest property in the receiver, that therefore it is of no effect. What is the effect of appointing a receiver in the Chancery Division? It operates as an injunction restraining the defendant from getting in money which the receiver is appointed to receive. The fallacy of the Appellant's argument is that as income to which the debtor is entitled does not vest in the receiver and so he cannot sue for it in his own name, therefore the debtor is still the party to receive it. To adopt this view would make the order for a receiver mean nothing, and would make it the duty of the debtor, not of the receiver, to get in the assets. The decision of Mr. Justice *Kekewich* in the case of *Re James* (2) appears to proceed on the view, whether right or wrong, that in that case no person had been appointed to receive the money, but here manifestly there is a person who has been appointed to receive it. The appeal, therefore, must be dismissed.

BOWEN and FRY, L.JJ., concurred.

Solicitors: *Ramsden & Co.; Oliver Green.*

(1) 16 Q. B. D. 548. (2) 62 L. T. (N.S.) 454.

H. C. J.

NUTTALL *v.* HARGREAVES.

[1890 N. 326.]

C. A.
1891
KEKEWICH, J.
May 6.
C. A.
Nov 11, 12.

Patent—Validity—Provisional Specification—Variation from Complete Specification—Nature of Invention—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 5, *sub-s.* 3, 26.

It is since the *Patents, Designs, and Trade Marks Act,* 1883, no less than before, an essential condition of a good patent that the provisional specification should describe the true nature of the invention, and that the invention there described should be the same as that claimed in the complete specification; and non-compliance with the condition is a ground for revocation of the patent.

The *dictum* of *Halsbury,* L.C., in *Vickers* v. *Siddell* (1) applied.

The patentee of an invention for tapping beer-barrels, and preventing waste and leakage, described his invention in the provisional specification as a plug screwed into the barrel end with a valve, and spring, and guide to keep the valve in its place. In the complete specification he added a description of a gauze strainer to keep impurities from escaping into the tap. It was proved that the gauze strainer was the only thing really novel or useful in the invention:—

Held (affirming the judgment of *Kekewich,* J.), that the provisional specification did not describe the true nature of the invention, and that the patent was invalid.

On the 20th of March, 1889, the Plaintiff, *Francis Nuttall,* filed a provisional specification for a patent for "an improved method of tapping barrels containing beer, porter, or other liquids, and preventing waste and leakage of the said liquids during tapping."

The provisional specification, which referred to the drawings annexed, stated that the invention consisted of the use of "a screwed bush or plug (*a*) secured to the barrel end (*b*), the bush also carries a guide for the valve (*c*) and spring (*d*), the valve being kept on the seating (*e*) in the bush by means of the spring (*d*) and preventing the liquor from escaping." It then described the action of the various parts of the invention, but made no mention of any strainer or gauze covering, to prevent the impurities in the barrel from running into the tap.

On the 30th of April, the Plaintiff filed the complete

(1) 15 App. Cas. 496.

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specification of his invention, in which he described the invention as consisting of the use of "a bush or plug (*a*) secured to the barrel end, the said bush or plug having arms or projections (*j*) for guiding the valve (*c*) and spring (*d*), and also a thread screw to receive the tap (*f*)." He then described the action of the invention in similar terms to those used in the provisional specification, but added: "the tap is also provided with a leather or rubber collar (*i*); the face of the valve (*c*) may also be provided with a similar facing of leather or other material; the valve casing or projections (*j*) are encircled by a gauze or strainer (*k*) to prevent hops or impurities from escaping through the tap." He claimed "a method of plugging or securing the outlet of the barrel by means of an arrangement of bush or valve casing, with valve and spring secured to the barrel end, in connection with a tap as shewn, and for the purpose hereinbefore set forth, and more particularly described in the specification and drawings."

The Plaintiff brought the present action against the Defendants, *Hargreaves* and *Bardsley*, complaining that they had infringed his patent, and asking for an injunction and damages.

The Defendants denied the infringement, and also called in question the validity of the Plaintiff's patent on the grounds that there was no novelty in the invention, that the Plaintiff had not sufficiently described the invention in his complete specification, and that the complete specification claimed an invention different from that described in the provisional specification.

At the trial the Defendants put in evidence various previous patents, in which the greater part of the Plaintiff's invention was anticipated. The Plaintiff, in his evidence, rested his claim to novelty upon his method of guiding the valve and spring, and upon the gauze strainer by which he was enabled to have larger holes for the liquor to run into the tap, and could clean the apparatus more easily than had been possible under previous patents. It was admitted that the Plaintiff's apparatus, as manufactured, was useful, and was an improvement on previous taps. If the Plaintiff's patent was valid, the infringement by the Defendants was not denied.

The action was heard before Mr. Justice *Kekewich* on the 6th of May, 1891.

Moulton, Q.C., and *H. Robinson*, for the Plaintiff.

Bousfield, Q.C., and *J. C. Graham*, for the Defendants.

KEKEWICH, J.:—

To my mind the only real difficulty in dealing with this case is to know what the strength and what the weakness of the Plaintiff's claim really is. I am sorely tempted to pause to inquire why the Court has been occupied so long in coming to a conclusion; but having now arrived, as far as I am concerned, at the end, perhaps it is better to say nothing on that subject. I turn to the specification which it has been my duty to read and endeavour to understand without much comment, and I find that in the early part, which is devoted to particularly describing and ascertaining the nature of the invention, the patentee says that his invention consists of "an improved method of tapping barrels containing beer, porter, or other liquids, and for preventing waste and leakage of said liquids during tapping." Mr. *Nuttall*, who was as honest a witness as ever I saw in a patent or any other case, and with whom I cannot help sympathising in his litigation, admitted that there was no real improvement in his patent either in tapping barrels or preventing waste or leakage. That he thought there was I have no doubt, when he obtained the grant of letters patent, but unfortunately he did not know what others had published, and he is now convinced that so far he is in error. That may be enough as it stands; but then following it there is, according to the ordinary sequence of patent literature, a description of the manner in which the invention is to be performed, and then he goes on to make his claim. Mr. *Nuttall*, I understand, framed this himself, and if he has not succeeded in framing an intelligible claim, or if he has managed to frame one which has given rise to puzzles, he may solace himself with the consideration that patent agents not only frequently, but I think I may venture to say always, succeed in puzzling judges, if not others, by the way in which they frame their claims.

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I am at a loss to understand this claim at all. I say I have studied it without comment, but after study I cannot really see what the Plaintiff's claim is, unless in charity I adopt the conclusion, which I understand to be pressed by Mr. *Moulton* in opening, that really what the Plaintiff claims is the thing described in the figures. But when we come to look at the thing which is described in the figures, it is, at any rate with one simple exception, the very thing to all intents and purposes which is described, I think I may say, in scores of figures before, and in other specifications. There is one exception and that exception is the gauze or strainer, which no doubt means the strainer made of gauze, which is to encircle the valve casing or projections in order to prevent hops and impurities from passing through. That is really the only attempt at novelty on which any one of the witnesses, at least after cross-examination, relied on. On that there seem to me to be two pertinent remarks. In the first place it has not been argued, and it could not be argued, that substituting a strainer made of wire gauze, a very well-known article for a perforated metal strainer, is an invention within the meaning of the ordinary patent law; and secondly this essential part is never mentioned in his provisional specification at all. I think when I have made those two remarks it would be waste of time to pursue the matter further. The Plaintiff has made, it is admitted, a useful tap, a tap which if not better than any other, is at any rate a good useful tap. The Defendants have given him credit for that not only at the Bar, but as I understand it by adopting it and imitating it, but I do not think there is any invention in the matter; and if there is any invention according to law, I think that he has been anticipated. So that on all grounds I am of opinion that the case fails. The Defendants must have the costs of the action; and I have looked through the particulars of objections, and I will give the Defendants a certificate as regards all of them.

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From this judgment the Plaintiff appealed. The appeal came on for hearing on the 11th of November, 1891.

Moulton, Q.C., and *H. Robinson*, for the Appellant:—

None of the previous inventions which are alleged as antici-

pations were really useful. Our invention is admitted to be useful and to work well, the contrivance for guiding the valve was both useful and novel. Where a patent is for combination of known materials, a very slight variation, if it makes a material improvement in the utility of the contrivance, may be supported as a patent: *Edison & Swan Electric Light Company* v. *Woodhouse* (1). However small the variation was, all the former inventions failed; ours succeeded. With respect to the alleged variance between the provisional and complete specifications, there is no real variance. The only difference is that the complete specification describes the details of the method of working the invention more in detail, and in doing so mentions the gauze strainer. It is not the object of a provisional specification to explain the mode of working the invention· it is sufficient if the nature of the invention is set forth. That was done in the present case. The strainer was no part of the invention; it was only a useful accessory in the mode of working it: *In re Newall & Elliot* (2). The rules as to the necessity of conformity between the provisional and the complete specification are not now so strict as they were before the Act of 1883, when a patent might be revoked on the ground that the Crown had been deceived by the patentee. Under the present law it is the duty of the comptroller and law officer to see that the specifications are in proper form, and if they are satisfied there is no ground for revoking the patent. The *dictum* of Lord *Halsbury*, L.C., in *Vickers* v. *Siddell* (3), may be cited against us, but there was no judicial opinion given on that point.

Bousfield, Q.C., and *J. C. Graham*, for the Defendants:—

The Plaintiff's invention had been anticipated in everything except the gauze strainer; and that is not made part of the invention in the provisional specification. The variance between the provisional and the complete specifications is in itself fatal to the patent.

[They were stopped by the Court.]

H. Robinson, in reply.

(1) 4 Rep. Pat. Cas. 79. (2) 4 C. B. (N.S.) 269.
(3) 15 App. Cas. 499.

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LINDLEY, L.J.:—

This is an appeal from the decision of Mr. Justice *Kekewich*, deciding in substance that the Plaintiff's patent is bad in point of law. The action was brought for infringement, and the Defendants gave no evidence except that in the course of the cross-examination of the Plaintiff's witnesses they put in certain documents—specifications of earlier patents. Without going through the evidence in detail, the result seems to be that the Plaintiff's invention, as described in his complete specification, and as ultimately brought out by him, is a useful invention. He appears to be a person of ingenuity, and a very honest man; but when he applied his mind to the improvement of these barrel taps, he did not know what his predecessors had done. He was ignorant in that respect, and that accounts, I think, for his failing to succeed in this action. But not knowing what had been done, he filed a provisional specification, in which he described the nature of his invention. It is not necessary, as we know, in a provisional specification to describe how the invention is to be carried out, but it is necessary to comply with sect. 5, sub-sect. 3, of the Act of 1883, which says that "A provisional specification must describe the nature of the invention, and be accompanied by drawings, if required." One point which we have to consider I will deal with at once, namely, what is the consequence now, under this Act of 1883, of not describing in the provisional specification the true nature of the invention, and what is the consequence of describing it for the first time in the complete specification? In order to answer that question we must look at further sections of the Act, and the important one, passing by sect. 14, is sect. 26, sub-sect. 3. Sect. 26 relates to revocation, and it says "(1.) The proceeding by *scire facias* to repeal a patent is hereby abolished; (2.) Revocation of a patent may be obtained on petition to the Court; (3.) Every ground on which a patent might, at the commencement of this Act, be repealed by *scire facias* shall be available by way of defence to an action of infringement and shall also be a ground of revocation." To give effect to that section, it is necessary to consider what was, before the Act, the effect of a patentee not stating in his provisional specification the real nature of his

invention, so as to identify it with the invention which he described in his complete specification. The answer to that has been settled by authority, and the last case of any importance was *Bailey* v. *Roberton* (1), in the House of Lords. If the invention described in the two specifications is not the same the patent is bad. The patentee need not, as I have already pointed out, go into details in the provisional specification; it is sufficient to describe the nature of the invention, but the nature of the invention there described must be the nature of the same invention as that to which the complete specification relates. In the face, therefore, of that 26th section, it appears to me that if those two specifications properly construed are not for the same invention, the patent cannot be upheld, and that is the view taken by Lord *Halsbury* in the case of *Vickers* v. *Siddell* (2). The passage I will read is at page 499. His Lordship says, "It is suggested that the new machinery of the comptroller and the examiner has superseded the power of raising any objection to the conformity of the provisional and the complete specification. I am unable myself to take that view. I think it is an essential condition of a good patent that the invention described in the provisional should be the same as that in the complete specification, and I think the 3rd sub-section of sect. 26 preserves this as a ground upon which an action for the infringement of a patent right may be defended, and a ground upon which a patent may be revoked." That appears to me, I confess, to be the view which is most in accordance with the sections of the Act to which I have referred. It is a view in no way dissented from by the other learned Lords, although they abstain from expressing a positive opinion upon it. It is also quite consistent with the view taken by this Court in the same case when it was before the Court, because every member of the Court left that particular point of law open for further discussion.

I proceed now to consider what the case really is. Looking at the provisional specification, and seeing what the nature of the invention is, I am very much struck with this, that there is no allusion at all to that which the Plaintiff himself in

(1) 3 App. Cas. 1055. (2) 15 App. Cas. 496.

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cross-examination said was an essential part of his invention—that is to say, the strainer of which we have heard so much. There is not a word about it in the provisional specification; and if it be, as I rather gather from the complete specification and from the evidence, that the strainer is an essential part of the invention—not merely as Mr. *Moulton* put it, a useful adjunct as pointing out the best way of working it, but really part of the invention—it is most unfortunate for this gentleman that there is not a word about it in his provisional specification. This provisional specification is for an improved method of tapping barrels and preventing waste and leakage during the tapping. Then he says, that it consists of "An improved method of tapping barrels containing beer, porter, or other liquids, and for preventing waste and leakage of said liquids during tapping by means of a screwed bush or plug (*a*), secured to the barrel end (*b*). The bush also carries a guide for the valve (*c*) and spring (*d*), the valve being kept on the seating (*e*) in the bush by means of the spring (*d*), and preventing the liquid from escaping." So that he has first a bush, with a guide-valve—that is part of his invention. Then the second thing is that he has a screw top to suit the bush, and the tap is arranged so that it is screwed into the bush a short distance, and before coming into contact with the valve, so as to prevent leakage through the bush before it reaches the valve. Then he says, "I provide the tap with a centre point (*h*), to engage in a corresponding recess in the valve." Now, looking at that specification alone, I am driven to the conclusion, that if this gentleman had any very definite idea in his mind at this time his invention was a combination of a screw-tap with a bush, carrying a valve which had guides. I cannot get more out of it than that. But if that is the nature of his invention then, when I come to look at the evidence, I find there is neither novelty nor utility in it. That particular invention—the mere combination of the screw-tap, with the guide and valve, and the bush—is old. The patentee did not know it; that was his misfortune. If he had known it he would have been more guarded, and he would have added what is essential to the success of his invention, namely, the strainer put round that part of the bush which projects into the beer barrel.

Now I come to the complete specification, which is not well worded. Here, again, I must read it with a *bonâ fide* view to understand it, and to ascertain really what the patentee means. He gives in greater detail how to carry out his provisional specification, and then he adds this, the importance of which is not pointed out, but still here it is, in his specification. He says: "The valve casing or projections (*j*) are encircled by a gauze or strainer (*k*), to prevent hops or impurities escaping through the tap." Then he refers to the drawings in the complete specification, which shew a wire gauze strainer, which is marked (*k*) in the figures, and which is referred to in that part of the specification which I have just read. The reader of this, if he had some knowledge of beer barrels, might or might not appreciate the importance of that strainer. The evidence shews not only that it is essential but that it is the essential part of the invention. There is no patentable invention without it—that is what the evidence shews.

Then he claims this: "What I claim is a method of plugging or securing the outlet of the barrel by means of an arrangement of bush or valve casing, with valve and spring secured to the barrel end in connection with a tap as shewn, as hereinbefore set forth, and more particularly described in the specification and drawings." I do not find therein any indication except in the obscurest way of this strainer. I can only find it by looking at the drawings. But I will assume in the patentee's favour that this may be read as a claim to the casing with the wire strainer as part of it, and an essential part of it. Reading it so, if the provisional specification were put in form, I am disposed to think that I might spell out of this (I am not sure I should not be straining it in order to do so) a combination of three things—a screw top with a guide-valve and a wire gauze strainer arranged as described. I think I might possibly get that out of it, although, as I say, I think it would require some little ingenuity to do it; but applying my mind fairly to see what he really means, I think I could get at that, and if I could get at that which is his real invention then it is admitted the Defendants have infringed it.

Then comes the difficulty, where is that to be found in the

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provisional specification? By no amount of ingenuity can it be found there—and that being the case it appears to me that this patent is invalid. I am sorry for it; for, as I say, the invention is ingenious; and if this gentleman had known what he found out when he got into the witness-box, that nine-tenths of his invention had been anticipated, he might have framed his specification in such a way as to have claimed that combination in both the specifications, and he might have so described the nature of the invention as to have upheld the patent.

I must add this; I do not think that when he took out his provisional specification he had the slightest idea of the importance of the strainer. I say I do not think he had, but he might have had.

For these reasons the appeal must be dismissed with costs.

BOWEN, L.J.:—

I am of the same opinion, and I regret like the Lord Justice, who has already given his judgment, the conclusion at which we are forced to arrive, but it is a conclusion based upon the construction of the Act of Parliament, and I think also upon public policy.

The ground upon which, to my mind, the case must be decided —although there may be others—and on which, so far as I am concerned, I desire to decide it, is that the provisional specification does not describe the nature of the Plaintiff's invention. Is that an objection, in the first place, which since the passing of the last *Patent Act* can be taken? To my mind there is nothing in the last *Patent Act* which shews that the application to the officer of the Crown, and the duty which the officer of the Crown has to discharge upon the application, relieves the patentee from the necessity of describing the nature of his invention in his provisional specification. Sect. 26 in the 3rd sub-section, shews that the objection which under the old law might be taken by *scire facias*, if there was such a default on the part of the patentee, may still be taken by defence in an action for infringement. It follows, therefore, that unless the nature of the invention is described in the provisional specification the patentee cannot recover.

That point which is now decided for the first time was left open in this Court by Lords Justices *Cotton* and *Fry* in *Vickers* v. *Siddell* (1). It was not decided in the House of Lords when that case went to the House of Lords, but the judgment which we are now pronouncing is in conformity with a *dictum* of the Lord Chancellor, who upon the grounds upon which we base our judgment to-day felt constrained in that case to say that he thought the law had not been altered in any way in that respect.

Then, has the nature of the invention been described in this case? First of all, what is the invention? We must look at the complete specification to see what the invention is—that is the place where a patentee is bound, not only to describe his invention, but the manner in which it is to be performed. There we find that the real invention that was patented was a combination of which the strainer was an element which gave it both novelty and utility—the strainer was the essence of the invention. I do not say that there is not an adjustment and guide which was useful, and perhaps was effective beyond the guides which had been invented before, though I doubt very much whether there was such novelty in the construction of that particular guide as would have sustained the patent. But the real invention here in the combination, which gave it utility, was the strainer. The strainer for the first time prevented the impurities from clogging the tap; and I think in the view of everybody, the patentee himself included—that was what was meritorious and what was successful in his idea.

Now it is to be observed that that strainer was not in his own mind at all at the time when he obtained the provisional specification. It was afterwards that it occurred to him, so that it cannot be said that the strainer was part of the invention which the provisional specification sets forth.

An ingenious argument was directed to us both by Mr. *Moulton* and Mr. *Robinson* (and I think we all felt how well Mr. *Robinson* argued this case in Mr. *Moulton's* absence) to the effect that the strainer was only a useful adjunct—that the real invention was the tap and the guide, and that the strainer was only a useful

(1) 39 Ch. D. 92; 15 App. Cas. 496.

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adjunct by which the invention might be carried out, or to use the words of the Act of Parliament, "the manner in which the invention was to be performed." If so, if you could treat it in that way, possibly its absence from the provisional specification would not be fatal, and the case of *In re Newall & Elliot* (1) was cited as an instance in which a patent had been held good, although the manner of giving it utility and effect was omitted from the provisional specification. But it seems to me that the true answer to that view is that it is impossible to take the history of this invention, to take the language of the provisional specification, and to take what had been done by previous so-called inventors in the matter, and to remain after weighing all these three things under the impression that the strainer was not the real invention in this case. I come to the conclusion that it was the real invention, and that unless you put it in the specification, you do not describe the nature of what was your real invention. The fact is (and this is the substance of the whole thing) that the patentee took out his provisional specification before the time arrived when he had absolutely matured his invention, and consequently he could not describe the nature of it. He had not got it; he did get it afterwards; and it is a pity that it was not in his original specification, because I am by no means prepared to say (though of course we have not heard the argument on the other side in the case) that I should not have thought the patent might have been supported but for the defect which my brother *Lindley* and myself have pointed out.

FRY, L.J., concurred.

Solicitors for the Plaintiff: *Tatham & Lousada.*

Solicitors for the Defendants: *W. J. & E. H. Tremellen*, agents for *A. M. Blair, Manchester.*

(1) 4 C. B. (N.S) 269.

M. W.

ALEXANDER PIRIE & SONS, *v.* GOODALL.

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VAUGHAN WILLIAMS, J.
May 11
C. A.
Nov. 17.

[1888 A. 1287.]

Trade-mark—Infringement—Registration—Removal from Register—Combination of Words in common use—Fancy Word—Distinctive brand—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 64, *sub-s.* 1 (*c*), *s.* 74, *sub-s.* 1 (*b*), *sub-s.* 2.

In 1885 the Plaintiffs, *A. Pirie & Sons*, were registered as owners of a trade-mark for paper, consisting of the words "*Pirie's Parchment Bank.*" They disclaimed the exclusive right to either of the words "*Parchment*" or "*Bank*," which were separately in common use in the trade, and were descriptive of different qualities of paper. The Plaintiffs used this mark for a particular quality of paper, both as a water-mark on the paper itself, and also on the wrappers in which the paper was sold:—

Held, first, that assuming that the Plaintiffs had not disclaimed the use of the words "*Parchment*" and "*Bank*" in combination, but only separately, those words could not be registered as a trade-mark under sect. 64, sub-sect. 2 (*c*) of the *Patents, Designs, and Trade Marks Act*, 1883, not being fancy words or words not in common use. Secondly, that the trade-mark could not be supported as a "brand" under the same clause. Thirdly, that the use of the word "*Pirie's*" did not bring the trade-mark within clause (*a*) of the same sub-section.

The judgment of *Williams*, J., affirmed.

Per Williams, J.: The word "*brand*" in clause (*c*) is wide enough to include a water-mark.

THE Plaintiffs, *Alexander Pirie & Sons, Limited*, were paper manufacturers and wholesale stationers. The Defendants, *Charles Goodall & Sons*, were wholesale stationers and playing card makers. On the 11th of March, 1885, the Plaintiffs applied for registration of mark No. 43549, consisting of the words "*Pirie's Parchment Bank*" for paper and envelopes in class 39, and the application was accompanied by the following disclaimer: "The applicants do not claim any right to the exclusive use of either the word '*Parchment*' or the word '*Bank*' as appearing in connection with this mark." At the date of registration the words "*Parchment*" and "*Bank*" were in common use in the trade.

The word "*Parchment*" denoted a paper of a hard texture somewhat resembling parchment, and the word "*Bank*" denoted paper of a special thinness, such as was used for bank notes. The

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Plaintiffs' mark was used by them in respect of a particular kind of thin hard paper; and it was used not only on the wrappers in which the paper was offered for sale, but on the paper itself as a water-mark. In 1888 the Defendants applied for registration of a trade-mark for paper and envelopes, consisting of the words "*Goodall's Cream-wove Parchment Bank*" inclosed in a heart, but the application was opposed by the Plaintiffs, and was rejected by Mr. Justice *North*, as being calculated to deceive: *In re Goodall's Trade-mark* (1).

The Plaintiffs then brought this action to restrain the Defendants from infringing their trade-mark.

By their statement of claim they alleged that the Defendants were selling note paper, manufactured for them, under the designation of "*Parchment Bank*," and were using those words on the wrappers in which such paper was offered for sale, and they claimed to restrain the Defendants from using these words on wrappers and boxes containing paper not of the Plaintiffs' make. The Defendants by their defence admitted these allegations, but alleged that the Plaintiffs' mark was not a special and distinctive mark, and they moved to have it expunged from the register. The action and motion came on together before Mr. Justice *Vaughan Williams* on the 11th of May, 1891.

Moulton, Q.C., and *Bund*, for the Plaintiffs:—

The Plaintiffs have for many years used the words "*Parchment Bank*" for a particular class of paper which is at once very tough and very thin. Both words are well-known to the trade, the word "*Parchment*" denoting a hard paper of the character of parchment, and the word "*Bank*" denoting a thin paper, such as is used for bank-notes. The Plaintiffs make no claim to the exclusive right to either of the words separately, but they claim the words in combination. The Defendants are by their own admission using the words "*Parchment Bank*" in respect of paper made for them. Having regard to the decision of Mr. Justice *North* in *In re Goodall's Trade-mark*, a *primâ facie* case of infringement is made out so long as the mark remains upon the register, and it is for the Defendants to displace that case.

(1) 42 Ch. D. 566.

Cozens-Hardy, Q.C., and *E. S. Ford*, for the Defendants:—

The Plaintiffs' mark ought to be removed from the register. The material sections of the *Patents Act*, 1883, are sects. 64 and 74 (1). The Plaintiffs can only claim their mark under the words "fancy word or words not in common use." There are two fatal objections to that claim. First, the words "*Parchment*" and "*Bank*" are not words "not in common use." The Plaintiffs have disclaimed the exclusive right to either of the words "parchment" or "bank" under sect. 74, and by that section what is disclaimed can only be entered as "an addition to any trade-mark." They therefore cannot claim those words as their trade-mark, and they do not seek to claim their own name as an essential part of their mark. Even if their name could be claimed, that is not what the Defendants have taken. Secondly, the words are not fancy words. In order that a word should be

(1) The *Patents Act*, 1883, provides:

Sect. 64 (1). "For the purposes of this Act, a trade-mark must consist of or contain at least one of the following essential particulars—

"(*a*) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or

"(*b*) A written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade-mark; or

"(*c*) A distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use.

(2.) "There may be added to any one or more of these particulars any letters words or figures, or combination of letters words or figures, or of any of them.

(3.) "Provided that any special and distinctive word or words, letter, figure, or combination of letters or figures or of letters and figures used as a trade-mark before the 13th day of August, 1875, may be registered as a trade-mark under this part of this Act."

Sect. 74 (1). "Nothing in this Act shall be construed to prevent the comptroller entering on the register, in the prescribed manner, and subject to the prescribed conditions, as an addition to any trade-mark— . . .

"(*b*) In the case of an application for registration of a trade-mark not used before the 13th day of August one thousand eight hundred and seventy-five—

Any distinctive word or combination of words, though the same is common to the trade in the goods with respect to which the application is made;

(2.) "The applicant for entry of any such common particular or particulars must, however, disclaim in his application any right to the exclusive use of the same, and a copy of the disclaimer shall be entered on the register."

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a fancy word, it must be obviously meaningless as regards the particular goods to which it is applied. It is not sufficient that a word should be used fancifully, if it is not a fancy word: *In re Van Duzer's Trade-mark* (1); *Waterman* v. *Ayres* (2).

It is conceded that each of the two words has a meaning as applied to paper, and that they cannot be claimed separately; our contention is, that the two words together are descriptive of the particular kind of paper to which they are applied.

Moulton, Q.C., and *Bund*, *contrà*:—

The words "*Parchment Bank*" in combination are not in common use in the trade, and the Plaintiffs are not precluded from claiming them in combination by the fact that the words cannot be claimed separately. The combination may be novel, although each of its component parts is old. The disclaimer applies only to the words used separately.

[VAUGHAN WILLIAMS, J.:—It is expressed to be a disclaimer of the exclusive right to the words "as appearing in connection with this trade-mark."]

That was not intended to include the words in combination. Suppose a trade-mark to consist of several devices, each of them being known to the trade, and the applicant enters a disclaimer as to each of the devices, could he not claim the combination? Further, the words are meaningless in combination, and are fancy words. The cases of *In re Van Duzer's Trade-mark* and *Waterman* v. *Ayres* are distinguishable, inasmuch as they were dealing with single words only. If the Plaintiffs cannot claim "*Parchment Bank*" as fancy words, the trade-mark can be supported as the name of an individual or firm under clause (*a*), to which they have added words under sub-sect. (2). Lastly, the Plaintiffs are entitled to these words as a brand, because they are used in reference to one particular quality of paper, and are applied to the paper itself as a water-mark. The word "brand" was used for the first time in the *Patents Act*, 1883, s. 64, sub-s. 1 (*c*). It must have some different meaning to the other words in the clause. We say that it means any device or

(1) 34 Ch. D. 623. (2) 39 Ch. D. 29.

words impressed upon or woven into a particular quality or class of goods. If these words can be claimed as a brand, then the words "not in common use" do not apply, and the decisions as to fancy words have no bearing on the case.

Cozens-Hardy, in reply on the motion:—

It has never before been suggested that a mark which could not be supported on any other ground might be supported as a distinctive brand, and it would be highly dangerous to accede to that argument. The word "brand" is confined to something which is burnt in, and does not include a water-mark. Assuming the Plaintiffs' mark to be a brand, it is not "distinctive" within clause (*c*).

VAUGHAN WILLIAMS, J.:—

In my opinion this trade-mark, which is claimed by the Plaintiffs, ought to be removed from the register, as not being a trade-mark which can properly be registered under the Act of 1883.

The Plaintiffs claim this trade-mark first as a mark consisting of a fancy word or words not in common use, and secondly as a brand.

With reference to the first question, whether this trade-mark can be supported as a fancy word or words not in common use, I am clearly of opinion that it cannot be so supported. We have got it both from the disclaimer contained in the application for registration, and also from the admission of Mr. *Moulton*, that the words "*Parchment*" and "*Bank*" are, separately, words in common use. In my judgment you cannot, under clause (*c*) of sub-sect. 1 of sect. 64, use separate words in common use, and then say that you do not come within the prohibitive part of the section because you are not claiming to use those words separately, but to use them in combination. According to my view of the construction of this section, we have nothing to do with a combination of words until we come to sub-sect. 2.

But, whether that is the proper construction of the section or not, I am clearly of opinion that those words taken, as Mr. *Moulton* asks me to take them, in combination, are not fancy

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words at all. It is perfectly obvious that they are descriptive words. Mr. *Moulton* admits that the two words "*Parchment*" and "*Bank*" are in effect adjectives descriptive of a quality of paper. How it can be said that a trade-mark which really consists of three words, one the manufacturer's name, and the other two appropriate adjectives describing qualities of paper, is not descriptive, I do not know. If they are descriptive words—if in combination they are descriptive words—it is perfectly plain, according to the decision in *In re Van Duzer's Trade-mark* (1), that they cannot be, and are not, fancy words.

I should have been disposed to go a step further, and point out another objection to the registration of this trade-mark as "a fancy word or words not in common use"—that is, that I do not think, having regard to the admitted use of the words "*Parchment*" and "*Bank*" as adjectives describing qualities of paper, that the words would be "distinctive" within the meaning of that word, as used at the beginning of this section. That disposes of that part of the claim.

But Mr. *Moulton* says that, if he cannot support his trade-mark as a distinctive fancy word or words not in common use, he is entitled to support it as a brand. As far as I know, this is the first time that the Court has been invited to decide whether a trade-mark, avowedly not capable of registration as a fancy word or words, can be admitted to registration because in point of fact it is used as a brand. I do not understand Mr. *Moulton* to go the length of saying that every combination of words, or every word, which is capable of being applied physically to the material in reference to which it is used, would come within the heading "brand," because, if that were so, the provision as to "fancy word or words not in common use," might just as well have been omitted from the section altogether; for it is very difficult to conceive any goods which would be incapable in some shape or other of receiving physically the word or words which it is claimed to register as a trade-mark. At the present moment the number of goods in respect of which that would be true that occur to my mind are very few indeed. In fact, I am not quite sure I can think of one. There are some things, I

(1) 34 Ch. D. 623.

suppose—I was going to say liquids, but in a measure liquids are capable of being branded, because, when you buy wine, part of the article you buy is not only the wine, but the bottle with the branded cork—at least I think so. But there are some liquids which are sold under such conditions that the vessel that contains them is not capable of being treated as part of that which is sold. But, however that may be, it is plain one must put some limitation on the word "brand" here. It cannot include every mark, whether consisting of a device or fancy words, or descriptive words, or whatever it may consist of, which is capable of impression on the material to be sold. I think there must be some limitation, and I think the limitation is really one in fact. I think that, before you can register anything as a brand, there must be evidence that, in point of fact, it is as a brand, and as a brand only that it is used. If that is necessary, I have no such evidence here. On the contrary, the evidence leads me to the conclusion that these persons, Messrs. *Pirie & Co.*, use the words "*Pirie's Parchment Bank*," not only for a brand to be impressed on the goods, but also in every way in which a trade-mark is ordinarily used. Under these circumstances I do not think that for that reason they can support their claim to this trade-mark as a brand, because that is not the user of the trade-mark which has been proved in fact before me. But I wish to add that, if this were a case in which there had been proof that the trade-mark in question had been used in fact as a brand and not otherwise, I do think that the introduction of this mark in the shape of the water-mark on the paper would be a brand within the meaning of the word "brand" in sect. 64. I do not think a brand is something that is to be burnt into the goods. I do not think a brand is something that is to be stamped on goods. I see no reason why a brand should not be woven into the goods, just as much as stamped on to them or burnt into them. Of course, derivatively, one does not doubt that "brand" ought to be limited to the case of burning into the goods, because no doubt in its root the word does imply burning; but I do not think that, in the use of the word in the English language, it is so limited. I have said this about the limitation of the use of the word "brand" here, because I do not like to think to myself

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that I am shrinking from defining the limitation which I am perfectly sure must be put somewhere upon the meaning of the word "brand" in this section. But I am of opinion that, in point of fact, the brand, if this be a brand, is not a distinctive brand; and, so far as the decision of this case is concerned, it would have been sufficient that I should have rested my decision that this trade-mark cannot be supported as a distinctive brand on that ground; and I do rest my decision on that ground, as being a ground which is sufficient to support the decision on that point. But I prefer to say, having said that, that I think that the word "brand" must be read with some such limitation as that which I have suggested, which is shortly that words which are not capable of registration as fancy words can only be registered as a brand, when in point of fact there is proof before the Court that those words have been used, in fact, as a brand and nothing else.

H. B. H.

C. A.

From this judgment the Plaintiffs appealed. The appeal was heard on the 17th of November, 1891.

Moulton, Q.C., and *Bund*, appeared for the Appellants.

Cozens-Hardy, Q.C., and *E. S. Ford*, for the Defendants, were not called on.

LINDLEY, L.J.:—

This is an appeal by Messrs. *Pirie & Sons, Limited*, against an order made by Mr. Justice *Vaughan Williams*, removing from the register a mark which they had registered as their trade-mark. The mark which is registered is a combination of words, "*Pirie's Parchment Bank.*" These words form a water-mark on paper of a particular quality made by the Appellants. The same words appear to be printed on the covers in which the paper so marked is sold, both wholesale and retail. A disclaimer in the following words appears upon the register in connection with the said trade-mark: "The Applicants do not claim any right to the exclusive use of either the word '*Parchment*' or the word '*Bank*'

appearing in connection with this mark." Now, upon that the question arises what this disclaimer means. One meaning is fatal to the present Appellants. If you take the disclaimer literally and strictly to mean that they do not claim either the word "*Parchment*" or the word "*Bank*," they are out of Court; but it may admit of another and perhaps less accurate construction. It may mean, and I will assume it does mean, what Mr. *Moulton* contends it means, that they do not claim the exclusive use of either of these words separately. They have not put in the word "separately," but I will assume that the disclaimer means that. I will assume that the disclaimer entitles them to say that, although they have disclaimed the right to the exclusive use of either the word "*Parchment*" or the word "*Bank*" separately, they can still claim the use of those words in combination, and either with or without the word "*Pirie*."

Then comes the question which has been principally discussed, whether that is a trade-mark capable of being registered under the Act of 1883, which is the Act which governs this particular matter. Mr. *Bund* contended that the trade-mark is "*Pirie's*," and that these words "*Parchment Bank*" are a mere addition to that. To dispose of that point we must read the section which is sect. 64, and ask ourselves whether "*Pirie's*" as printed here in the genitive and with an apostrophe, is "the name of an individual or firm printed, impressed or woven in some particular or distinctive manner." It is not the name of an individual, it is not the name of a firm, and I do not know that it is printed in any particular or distinctive manner. All that is shewn upon the register is that the letters are printed in outline, but that is common enough. But the true answer to Mr. *Bund's* contention is that "*Pirie's*" is not the name of an individual, nor is it the name of a firm.

That brings us to Mr. *Moulton's* point, which is extremely ingenious, to say the least of it. He says: that although this is not a distinctive device, or a distinctive mark within clause (*c*) of sect. 64, it is a "brand," and he contends that a brand within the meaning of this clause, although it may consist only of a combination of words, need not be something burnt into an article or impressed upon an article, which is the case with metal

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goods. He says that a brand may be something woven into the texture of the paper like a water-mark, or so incorporated into the substance of the article as not to be upon it or annexed to it. Perhaps brand may be used in that large sense, though I am not sure of it. I do not know what the doubt was which led to the introduction of the word "brand" into the Act of 1883; the word was not used in the previous Act of 1875; I do not see even now why "mark" does not include "brand." A brand is a particular kind of mark, but the doubt may have been whether anything burnt into or forming part of the article would come within the older definition. However, there is the word, and the Appellants are entitled to the benefit of its introduction.

Let us see what the real meaning of this section is now that the word "brand" is in it. Does it mean something different from what it meant before that word was used? so different I mean as to give this clause a construction totally different from that which has ever been put upon it before. Now, in order to understand this clause (*c*), which contains the word "brand," we must read not only this clause, but the whole section, and not only that section but the other sections of the Act which relate to this subject-matter. I do not think there is any section, except possibly sect. 74, which does relate to it; but the whole of sect. 64 is, to my mind, of great importance. It says, "for the purposes of this Act, a trade-mark must consist of or contain at least one of the following essential particulars." Then it mentions "a name of an individual or firm," "a written signature" (I will not read it at length); and then clause (*c*) is as follows: "A distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use." Now, omitting for the moment the word "brand," the other words have been construed in several cases, of which *Ex parte Stephens* (1), *In re Leonard & Ellis' Trade-mark* (2), and the *Great Tower Street Tea Company* v. *Smith* (3), are the leading ones. It has been construed as I will paraphrase it directly and the construction put upon it is I think obviously the right one and is more clearly seen to be the right one the more the section itself is considered.

(1) 3 Ch. D. 659. (2) 26 Ch. D. 288.
(3) 6 Rep. Pat. Cas. 165.

The section means this: Your trade-mark may consist of a distinctive device, mark, heading, label, or ticket. But if your trade-mark is to consist of words, the words must be fancy words, or words not in common use. Now that this is the true construction, follows, I think, not only from the cases to which I have alluded, but is made plain by the sub-sects. 2 and 3. The 2nd sub-sect. is this: "There may be added to any one or more of these particulars any letters, words, or figures, or combination of letters, words, or figures, or of any of them." Then in sub-sect. 3 there is a proviso which is very significant: "Provided that any special and distinctive word or words, letter, figure, or combination of letters or figures or of letters and figures used as a trade-mark before the 13th day of August, 1875, may be registered as a trade-mark." So that when you are dealing with words you may register two things under this Act of Parliament, you may use either fancy words not in common use, or you may use words or combinations of words, if they were used as trade-marks before August, 1875. The only other mode of using words at all is under the clause I have just read, "words or combinations of words added to the particulars before-mentioned." If you go on to sect. 74, I think that construction which I have stated comes out, I do not say more plainly, but as plainly. Sect. 74 is confined to what may be used as an addition to any trade-mark, and you may add as an addition to any trade-mark: "Any distinctive word or combination of words, though the same is common to the trade in the goods with respect to which the application is made," if it is not used before August, 1875; and then there comes the disclaimer clause: "The applicant for entry of any such common particular or particulars must, however, disclaim in his application any right to the exclusive use of the same, and a copy of the disclaimer shall be entered on the register." Now, as it appears to me, it would be utterly ludicrous to say that the words "distinctive device, mark, heading, label, ticket," cannot consist of words unless they are fancy words or unless they have been used before 1875, and yet to say that "brand" lets in all those things which the other words excluded. What is the difference between "mark" and "brand"? Upon what conceivable theory can we

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say that a brand may consist of words of which a mark cannot? It appears to me to be almost a *reductio ad absurdum.*

Upon these short grounds I think the view taken by the learned Judge was right, and that this mark is not and cannot be a mark capable of being validly registered under the Act of 1883. The appeal, therefore, must be dismissed.

BOWEN, L.J.:—

I am of the same opinion.

KAY, L.J.:—

I agree entirely.

Solicitors: *Paddison, Son, & Fullilove; Robbins, Billing & Co.*

M. W.

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[1891 P. 214.]

Will—Devise of House with Windows to one and of Land adjoining to another —Right of Light to Windows over the Land.

The law as laid down by *Palmer* v. *Fletcher* (1), and the subsequent cases of *Allen* v. *Taylor* (2), and *Rigby* v. *Bennett* (3), applies to devises by will as well as to contemporaneous grants by deed.

So where a testator being seised in fee in possession of a house with windows and of an adjoining field over which the right of light required for the windows passed, devised the house to one, and the field to another :—

Held, that the right to light over the field passed to the devisee of the house, and that the devisee of the field was not entitled to block up the windows of the house.

THE Plaintiff, *Arthur Phillips*, was the owner in fee of a messuage known as *Meadowcroft*, at *Catford*, in the county of *Kent*, and the Plaintiff *Buck* was the lessee thereof.

The Defendants were the owners in fee of the land lying to the north of and adjoining *Meadowcroft*, and had obstructed the light and air coming thereto by erecting a building, and placing hoardings on the land close to the messuage.

The messuage and land formerly both belonged to one *J. J. Stainton*, who died possessed thereof in the year 1875, he having previously built the messuage as a washhouse, stables, billiard room, and observatory, and it was the access of light and air to a door and windows in such messuage which the Defendants had obstructed.

At the time the messuage was built and down to the time of the death of *J. J. Stainton* the only building standing on the land to the north of the messuage was a cottage called *Laurel Lodge*, surrounded by a garden occupied by one *G. T. Williams*, and not interfering in any way with any light or air coming to the messuage.

J. J. Stainton made his will dated the 30th of June, 1875, and thereby devised to *G. T. Williams* the cottage called *Laurel*

(1) 1 Lev. 122. (2) 16 Ch. D. 355.
(3) 21 Ch. D. 559.

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Lodge, together with the land thereto adjoining up to the boundary of *Meadowcroft*, and devised all the residue of his freehold property to trustees upon trust for sale.

The Plaintiff *Phillips* became entitled to *Meadowcroft* under an exercise of the trust for sale contained in the said will. The Defendants purchased *Laurel Lodge* and the adjoining land from *G. T. Williams*.

The Plaintiff, *Buck*, resided in one part of *Meadowcroft*, and carried on business as a coachbuilder on the other part thereof.

In August, 1890, the Defendants commenced to build a lodge on the north side of *Meadowcroft* within a few inches thereof which almost entirely obstructed the light and air coming to the door and windows in such messuage.

Complaints were made by the Plaintiffs to the Defendants that they were not entitled to build the lodge, and the Defendants insisting that they had such right, the writ in this action was issued on the 26th of January, 1891, and on the 29th of January the Defendants commenced to erect, and shortly afterwards completed a hoarding painted black within six inches of most of the windows and openings in *Meadowcroft*.

A motion was made in this action for an injunction to restrain the obstruction to the access of light and air as aforesaid, whereupon the Defendants undertook without prejudice to remove the hoarding and the motion was ordered to stand till the trial.

The Plaintiffs claimed that the Defendants might be restrained from obstructing or interfering with the access of light and air coming to *Meadowcroft*, and that they might be ordered to remove the building already erected by them, or to pay to the Plaintiffs damages for obstructing and interfering with the access of such light and air.

The action now came on for trial.

Byrne, Q.C., and *Yate Lee*, for the Plaintiffs:—

Where the owner of a house and field by deed for value grants the house but retains the field, the law is settled that a right to the light required for the enjoyment of the house passes to the grantee, the reason being that the lights are a necessary and

essential part of the house: *Palmer* v. *Fletcher* (1). The principle of that case applies where the house and land are sold and conveyed to two different persons contemporaneously: *Rigby* v. *Bennett* (2); *Allen* v. *Taylor* (3).

Why should not the same rule apply to such a case as this? The testator has given a portion of his estate to be enjoyed, and intends that it is to be enjoyed by one devisee, and it could never have been his intention that such enjoyment should be defeated by the devisee of another portion of his estate: *Myer* v. *Catterson* (4).

Although there is no direct authority on the question, the cases of *Barnes* v. *Loach* (5) and *Pearson* v. *Spencer* (6) are very much in point.

[They also referred to *Polden* v. *Bastard* (7); *Pheysey* v. *Vicary* (8); and *Bayley* v. *Great Western Railway Company* (9).]

Farwell, Q.C., and *Pattisson*, for the Defendants:—

The principle laid down in *Palmer* v. *Fletcher* applies only where the conveyance is by deed for valuable consideration, and does not apply to a voluntary deed, and we submit that neither does it apply to the case of a will. The basis of the doctrine laid down in that case, and developed by the subsequent authorities, was contract or implied contract on the part of the person retaining or taking the field that he would not obstruct the lights, and where there is no contract the doctrine does not apply, and consequently, as there is not and cannot be any contract between a testator and his devisees, the doctrine does not apply to the case of a will: *Birmingham, Dudley and District Banking Company* v. *Ross* (10).

[They also referred to *Russell* v. *Watts* (11), and the cases cited by the other side.]

Byrne, in reply.

(1) 1 Lev. 122.
(2) 21 Ch. D. 559.
(3) 16 Ch. D. 355.
(4) 43 Ch. D. 470.
(5) 4 Q. B. D. 494.
(6) 1 B. & S. 571; 3 B. & S. 761.
(7) Law Rep. 1 Q. B. 156.
(8) 16 M. & W. 484.
(9) 26 Ch. D. 434.
(10) 38 Ch. D. 295.
(11) 10 App. Cas. 590.

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Nothing turns on the particular language of the will—that is admitted. The circumstance that the devise of the Defendants' tenement is expressed to be made free of incumbrances, that it is a specific devise in form, and that the Plaintiffs' tenement is comprised in a residuary devise of messuages, are all immaterial, and rightly admitted to be so. The term "incumbrance" does not affect the question of light; and a devise of land, though in form residuary, is specific: *Lancefield* v. *Iggulden* (1).

The question, then, may be stated in this simple form: A man being seised in fee in possession of a house with windows, and of an adjoining field over which the light required for the windows passes, devises the house to one and the field to another; does the right to the light over the field pass to the devisee of the house, or is the devisee of the field entitled to block up the windows?

If the owner of the house and field by deed for value grants the house but retains the field, it is settled law that a right to the light required for the enjoyment of the house passes to the grantee. Why? The reason stated in *Palmer* v. *Fletcher* (2), the leading case on the subject, is that "the lights are a necessary and essential part of the house." In other words, what is conveyed is not a mere brick or stone building with apertures called windows, but a house with windows enjoying light. This is the broad, substantial reason which commends itself at once to the common sense of mankind. Worked out somewhat more technically, the conveyance operates as an implied grant of the light. Blocking up the windows by the grantor is regarded as an attempt on his part to derogate from his grant—a form of expression which assumes that the right to light has passed to the grantee. The implication does not necessarily arise upon a mere perusal of the deed itself: generally the situation and ownership of the adjoining field is not disclosed; but the implication of grant arises *primâ facie* so soon as the facts are ascertained that the light required for the windows passed over the field, and that the grantor was owner of the field at the time of the grant. On these facts being known, and in the absence

(1) Law Rep. 10 Ch. 136. (2) 1 Lev. 122.

of any other special circumstances, the law imputes to the parties an intention that the easement of light should pass with the house by virtue of the grant. As I have recently stated with more fulness my opinion in regard to the subject of the implied grant in the case of *Beddington* v. *Atlee* (1), I refrain from repeating what I there said. When all the surrounding circumstances which may legitimately be inquired into are made known, the result may be different—the *primâ facie* implication or inference may be wholly displaced or considerably modified, as was held in the case of the *Birmingham, Dudley and District Banking Company* v. *Ross* (2). Where the implication arises, the easement which passes is an easement created *de novo*.

The principle of the decision in *Palmer* v. *Fletcher* (3), applies where the house and the land are sold and conveyed to two different grantees contemporaneously, as stated by the late Master of the Rolls (Sir *G. Jessel*), in his judgments in *Rigby* v. *Bennett* (4), and *Allen* v. *Taylor* (5).

It was argued for the Defendants that the principle applies only where the conveyance is by deed for valuable consideration. No authority was cited in support of this contention, which appears to me to be absolutely without foundation. The implied grant does not arise from the consideration for the grant, but from the grant and the surrounding circumstances, whether the intention of both the grantor and grantee under a voluntary deed is regarded, or the intention of the grantor alone is regarded, the result is the same. The intention to be imputed is that a house with lights shall pass.

This argument as to a voluntary conveyance was a step towards the Defendants' main contention, that the principle does not apply to a will. In my opinion, it does apply to a will. No authority for this contention on the Defendants' part was cited. All the reasoning on the subject appears to me to apply to a will where the intention of the testator alone is regarded. A will operates as a simultaneous conveyance of the house and the field to the two devisees. The question is covered, or all but

(1) 35 Ch. D. 317.
(2) 38 Ch. D. 295.
(3) 1 Lev. 122.
(4) 21 Ch. D. 559, 567.
(5) 16 Ch. D. 355.

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covered, by two authorities cited for the Plaintiffs. In *Barnes* v. *Loach* (1), it was decided that the easement of light passed with the house without express words, the ground of the decision as stated in the judgment of the Court being, that if the owner of an estate has been in the habit of using *quasi* easements of an apparent and continuous character over the one part for the benefit of the other part of his property and aliens the *quasi* dominant part to one person, and the *quasi* servient to another, the respective alienees, in the absence of express stipulation, take the land burdened or benefited as the case may be, by the qualities which the previous owner had a right to attach to them. *Pearson* v. *Spencer* (2) was a case of a will. The testator had unity of possession of an estate which he divided by his will into two farms, devising one to the plaintiff and the other to the person under whom the defendant claimed. The way claimed by the defendant was the sole approach which had been used by the testator for the house and farm devised to the person through whom he claimed. It was decided that this way passed to the devisee of the defendant's farm, although there were no express words of gift of the way. In delivering the judgment of the Court of Queen's Bench, *Blackburn*, J., after referring to the distinction between continuous and discontinuous easements, stated that *Pheysey* v. *Vicary* (3), was an authority that the rule in this respect applied as well to a will as to a deed. In delivering the judgment of the Exchequer Chamber, *Erle*, J., stated that the judgment of the Court below was upheld on the construction and effect of the will taken in connection with the mode in which the premises were enjoyed at the time of the will. He said that the case fell under that class of implied grants where there is no necessity for the right claimed, but where the tenement is so constructed as that part of it involves a necessary dependence, in order to its enjoyment in the state it was when devised, upon the adjoining tenement. Upon the facts of that case, the Courts held that the way passed under the will. The ground of this decision applies to the present case. The house devised to the persons through whom the Plaintiffs claim,

(1) 4 Q. B. D. 494. (2) 1 B. & S. 571; 3 B. & S. 761.
(3) 16 M. & W. 484.

contained windows so constructed as to involve a necessary dependence, in order to its enjoyment of light, upon the adjoining tenement. Light is an apparent continuous easement (1). The case of *Polden* v. *Bastard* (2), which related merely to the easement or *quasi* easement of a way which is a discontinuous easement, is not in point.

It was part of the argument for the Defendants, that the basis of the doctrine laid down in *Palmer* v. *Fletcher* (3), and developed by subsequent authorities, was contract, or implied contract on the part of the person retaining or taking the field that he would not obstruct the lights, and that where there was no contract, the doctrine was inapplicable, and consequently that as there was no contract between a testator and his devisees, there was no ground for applying the doctrine to the case of a will. In support of this contention, certain expressions of the Lord Justices in their judgments in the case of the *Birmingham, Dudley and District Banking Company* v. *Ross* (4), were cited. It is unnecessary to deal with them at length. It is sufficient to say, that in my opinion the Lords Justices did not intend to alter the law as to implied grants, and that my decision in this case is not affected by anything which fell from them; and further, assuming that where there is a deed between parties, the doctrine ought to be explained theoretically as resting on contract as its basis. I see no difficulty in applying by analogy, in the case of a will, an obligation, or condition, or duty (whichever may be the right term) on the part of the devisee, or imposed on him by the testator, not to obstruct the access of light to the house devised to another. I prefer, however, to rest my judgment on the broad principles already stated.

Solicitors: *H. Foskett; Newton, Wyatt & Newton*, agents for *Newton & Newton, Lewisham.*

(1) *Gale* on Easements, 4th Ed. p. 22.

(2) Law Rep. 1 Q. B. 156.

(3) 1 Lev. 122.

(4) 38 Ch. D. 295.

G. M.

CHITTY, J.
1891
Nov. 13.

NATIONAL PERMANENT MUTUAL BENEFIT BUILDING SOCIETY *v.* RAPER.

[1890 N. 404.]

Practice—Mortgage—Foreclosure absolute—Receipt of Rents after Day fixed for Redemption—Form of Affidavit.

When a mortgagee receives rents after default has been made in payment of the principal and interest on the day fixed for redemption, but before the affidavit of such default is sworn, an order for final foreclosure will nevertheless be made without any further account.

Constable v. *Howick* (1) followed.

Ross Improvement Commissioners v. *Usborne* (2) not followed.

Form of affidavit in support of an application for foreclosure absolute discussed.

THIS was a foreclosure action.

On the 14th of June, 1890, the ordinary foreclosure judgment was made, the time fixed for redemption being six months after the date of the Chief Clerk's certificate.

On the 31st of January, 1891, the certificate was made, finding the amount due to the Plaintiff society under the mortgage to be £74,955. Between the 31st of January, and the 31st of July, 1891, the Plaintiff society received a considerable sum from the rents of the mortgaged hereditaments, and by an order of the 4th of August, 1891, the time for the Defendant to redeem was enlarged until the 4th of September, 1891, and by the same order the amount due to the Plaintiff society on their mortgage, and payable on the said 4th of September, was found to be £73,596 17*s.* 4*d.* The Defendant failed to pay the amount so found due, and the usual certificate of attendance to receive the mortgage money and of default having been made, was obtained.

Subsequently to the 4th of September, but before the affidavit in support of the application for an order absolute was sworn, the Plaintiff society received further sums amounting to £991 15*s.* 7*d.* for rents of the mortgaged hereditaments.

(1) 5 Jur. (N.S.) 331. (2) W. N. (1890) 92.

On the 28th of October, 1891, an affidavit in support of the application for an order absolute was sworn by the secretary to the Plaintiff society and one of his clerks, which in addition to the formal parts proving the attendance and default in payment on the 4th of September, contained the following passages: "Since the 4th day of September, 1891, the Plaintiff society have received rents and profits of the mortgaged hereditaments amounting to £991 15*s.* 7*d.*"

"And I, speaking positively for myself and to the best of my knowledge and belief as to other persons, say that, save and except the said sum of £991 15*s.* 7*d.*, I have not, nor has nor have any other person or persons, by my order or by the order of the Plaintiff society, or for their use, received the sum of £73,596 17*s.* 4*d.* in the order made in this action, and dated the 4th day of August, 1891, mentioned, and thereby appointed to be paid to the Plaintiff society by the Defendant on the 4th day of September, 1891, or any part thereof, but that, save as aforesaid, the whole of the said sum of £73,596 17*s.* 4*d.* remains due to the Plaintiff society."

S. Eady, for the Plaintiff society, now moved *ex parte* for a final foreclosure order:—

There is a prevailing idea in the profession and in the Registrar's office, that an order absolute cannot be obtained in circumstances like the present without a further account, and a fresh period for redemption; this idea is erroneous, and arises from a mistaken view of the authorities.

The receipt of rents by a mortgagee after the date fixed for redemption does not re-open the foreclosure, or necessitate a further account, even though such rents have been received, as here, before the affidavit proving the default has been sworn: *Constable* v. *Howick* (1). That case is precisely in point. In *Garlick* v. *Jackson* (2); *Alden* v. *Foster* (3), and *Ellis* v. *Griffiths* (4), the mortgagee had received rents before the day fixed for final payment; consequently a new account and a further period for redemption was necessary; but these authorities do not apply to

(1) 5 Jur. (N.S.) 331.
(2) 4 Beav. 154.
(3) 5 Beav. 592.
(4) 7 Beav. 83.

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the present case. In *Webster* v. *Patteson* (1) it was held that the receipt of rents by the mortgagee after the time fixed for redemption by the *puisne* mortgagee, and before final judgment had been obtained, did not open the foreclosure as regards him. Then comes *Jenner-Fust* v. *Needham* (2) before *Pearson*, J., where the question was raised whether the receipt of rents by a receiver between the date of the certificate and the day fixed for redemption made any difference, and the Judge held it did, but he went on to say (3): that "when a mortgagee has obtained an order absolute for foreclosure, or is in a position to obtain it, it has been held that the subsequent receipt of rents by him will not open the certificate, but that is because the mortgagee has then become, or is entitled to become, the absolute owner of the mortgaged property." That *dictum* is in my favour, and does not appear to have been modified or altered on appeal: *Jenner-Fust* v. *Needham* (4) has been further explained in *Coleman* v. *Llewellin* (5) as shewing that a further account is only necessary where rents have been received before the day fixed for redemption. The decision of *Stirling*, J., in *Ross Improvement Commissioners* v. *Usborne* (6) is against my present contention, but in that case *Constable* v. *Howick* (7) does not appear to have been cited, and I submit that in any case the decision is erroneous.

[CHITTY, J.:—A difficulty is suggested by the Registrar that in the affidavit in support of your application for foreclosure absolute, you must be in a position to swear that you have received nothing in the interval; the usual form is "that the said sum hath not nor hath any part thereof been paid." If you delay getting your order absolute, must you not still come with an affidavit up to date shewing that you have not received anything?]

This is not necessary where money has been received after the mortgagee has become, or is entitled to become, the absolute owner. The form of affidavit given in *Daniell's* Chancery

(1) 25 Ch. D. 626.
(2) 31 Ch. D. 500.
(3) Ibid. 503.
(4) 32 Ch. D. 582.
(5) 34 Ch. D. 143.
(6) W. N. (1890) 92.
(7) 5 Jur. (N.S.) 331.

Forms (1) and suggested in *Seton* on Decrees (2), is not statutory, and a slavish adherence to it is not necessary. The practice regulates the affidavit, not the affidavit the practice. If a mortgagee came after a delay of five years to make the order absolute the Court would, according to Lord *Hatherley* in *Prees* v. *Coke* (3), require "some explanation of the delay." In the present case the two months' delay was caused by the Long Vacation.

[He also referred to *Seton* on Decrees; *Daniell's* Chancery Practice (4); *Fisher* on Mortgages (5).]

CHITTY, J.:—

I think you are entitled to the order you ask.

The case of *Constable* v. *Howick* (6) is a decision of Lord *Hatherley's* when Vice-Chancellor, which, so far from being overruled, has never even been questioned up to this time; indeed, the principle of that decision was adopted and acted upon by Lord Justice *Kay* (then Mr. Justice *Kay*) in *Webster* v. *Patteson* (7). The only case that has been brought to my notice which seems to be at all in conflict with these decisions is that of *Ross Improvement Commissioners* v. *Usborne* (8), a decision of Mr. Justice *Stirling*, which appears only in the *Weekly Notes*, from which it seems that the only cases which were brought to the attention of the learned Judge were *Jenner-Fust* v. *Needham* (9) and *Hoare* v. *Stephens* (10); and I think I am justified in coming to the conclusion that these were the only cases referred to, and, consequently, that *Constable* v. *Howick* was not cited or brought to the attention of the learned Judge. I cannot find any reason for not following *Constable* v. *Howick*; it has the support of Mr. Justice *Kay*, and, so far as I am called upon to express an opinion, I agree with it. There is nothing in the delay which has taken place before this application was made; it has been satisfactorily explained, and seems chiefly attributable to the Long Vacation.

With reference to the difficulty suggested by the Registrar as

(1) 4th Ed. Forms, 1539, 1540.
(2) 4th Ed. p. 1089.
(3) Law Rep. 6 Ch. 645, 650.
(4) 6th Ed. pp. 1405, 1407.
(5) 4th Ed. pp. 877, 958.
(6) 5 Jur. (N.S.) 331.
(7) 25 Ch. D. 626.
(8) W. N. (1890) 92.
(9) 31 Ch. D. 500.
(10) 32 Ch. D. 194.

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to the form of the affidavit in support of this application, I do not think it is a serious one; the forms of affidavit, given or suggested in the practice books which have been referred to, are convenient no doubt, but they are only forms, capable of modification according to the circumstances of each case; the form of affidavit cannot, and does not, regulate the practice.

The result is, that, in my opinion, it is not necessary to carry on the account, or to give a further day for redemption, and the Plaintiff society is entitled to an order absolute.

Solicitors: *Russell & Co*

W. C. D.

C. A.
1891
Nov. 25.

In re BIGNELL.
BIGNELL *v.* CHAPMAN.

[1888 B. 3814.]

Practice—Receiver—Trustee—Remuneration.

There is no inflexible rule that a trustee can only be appointed receiver on the terms of his having no remuneration.

A testator directed his trustees, of whom *S.* was one, to allow *S.* to manage his business during her own life, subject to a power in the co-trustees to stop the carrying on the business if carried on unsuccessfully for any period of eighteen months. *S.*, while she managed the business, was to have one-fourth of the net profits, but not to an amount exceeding £800 a year. Shortly after the testator's death a judgment for administration was made, which directed inquiries as to the business, and appointed *S.* receiver and manager of it as from the testator's death, without giving security, not saying anything as to remuneration. About fifteen months after the testator's death *S.* resigned her office, having been in bad health for several months, and shortly afterwards died. The business had fallen off, and the profits for the whole period of her receivership were very trifling. Her executors in passing her accounts asked for remuneration to be allowed her at the rate of £800 a year. The residuary legatee insisted that there ought to be no remuneration. Mr. Justice *North* allowed £500, being at the rate of £400 a year. The residuary legatee appealed:—

Held, that although the Court does not usually appoint a trustee to be receiver except on the terms of his having no remuneration, there is no inflexible rule that he shall not receive remuneration, and that the fact of the judgment not mentioning remuneration did not amount to a decision that there should not be any, that Mr. Justice *North* therefore had a discretion, and that no ground was shewn to induce the Court of Appeal to interfere with his exercise of it.

R. R. BIGNELL died on the 17th of July, 1888, leaving a will by which he appointed Mrs. *Sarah Ann Squier* and two other persons executors and trustees. He directed his trustees to allow Mrs. *Squier* to carry on his business at the *Trocadero*, or any other business in which he might be engaged at his decease, during her life, or until the business should be put an end to under the directions thereinafter contained, and to allow her to employ therein such parts of the capital of his estate as should be employed therein at his decease, and such additional capital as his trustees, or the majority of them, should think requisite.

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The testator directed that while she acted as manageress she should render proper accounts to her co-trustees or co-trustee, and that such co-trustees or co-trustee might at any time put a stop to the carrying on of the business if it should have been unsuccessfully carried on for any period more or less continuous of eighteen months, or in case Mrs. *Squier* should fail to render proper accounts. "And I declare that the said *S. A. Squier* may, during such time as she carries on the said business, retain for her own use and benefit, in addition to any other benefit she may take under my will, one equal fourth part of the net profits of any such business, provided such one-fourth part shall not exceed the sum of £800 per annum; but if otherwise, the said *S. A. Squier* shall only be entitled to retain the sum of £800 per annum as and by way of salary, but no further or other remuneration, and shall pay or account for the residue of such profits (if any) to my trustees, to be applied by them as part of the income of my estate." Subject to the above directions the testator directed that his business should be sold as a going concern.

The will was proved by all three executors on the 16th of August, 1888, and on the same day a judgment was given for the administration of the testator's estate at the suit of the tenant for life of the residue. This judgment had been pronounced on the 6th, but was post dated to make it subsequent to the probate. Among the inquiries directed by it was the following:—

"6. An inquiry whether it will be proper and for the benefit and advantage of the persons interested in the testator's estate that the testator's business of the *Trocadero Music Hall* should be carried on and continued, and if so in what manner and upon what terms; and if not, what should be done in respect thereof, and also in respect of the licences for music in connection therewith. But this inquiry is not to prejudice the rights of the Defendant *S. A. Squier* to carry on the same for the period of eighteen months from the testator's death in accordance with the trusts in the testator's will."

And the judgment contained the following clause:—

"And this Court doth hereby appoint the Defendant *S. A.*

Squier, without giving security, as from the 17th of July, 1888, the day of the death of the testator, to manage the said *Trocadero Music Hall*, and to collect, get in, and receive the debts now due and outstanding belonging to the said business carried on by the testator at the *Trocadero Music Hall*, and out of the moneys to be received to pay the debts to be incurred in carrying on the said trade or business." It was ordered that the trustees should hand over to her all stock in trade, goods and effects, books and papers belonging to the business, and that she should leave her accounts in Chambers on the 6th of February and the 6th of August in each year, and pay in the balances found due.

In the summer of 1889 Mrs. *Squier* fell into very bad health, and on the 3rd of October, 1889, she signed a memorandum resigning her office. On the same day an order was made discharging her from being receiver and manager, directing her to leave in Chambers her final account, and appointing a new receiver and manager.

On the 9th of December, 1889, Mrs. *Squier* died, and on the 29th of January, 1890, an order was made directing her executors to carry in and pass an account of her receipts and payments from the foot of the last account.

Three accounts in all were lodged in Chambers. The first account up to the 6th of February, 1889, shewed a balance of £413 16*s.* 9*d.* due from Mrs. *Squier*. The second a balance of £182 13*s.* 2*d.*, due to her, and the final account, £74 5*s.* 5*d.*, due to her, thus making the balance of £156 18*s.* 2*d.* due from her on the whole.

Her executors claimed remuneration for her services as receiver and manager at £800 a year. Mr. Justice *North*, in Chambers, made an order allowing £500 for her salary, remuneration, and expenses from the death of the testator to the date of her discharge.

The Plaintiff appealed, asking that the claim might be wholly disallowed, or that, if any amount should be allowed, it should not be at a higher rate than £3 per week.

Cozens-Hardy, Q.C., and *Lake*, for the appeal:—

We contend that to allow remuneration to a trustee who is

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appointed receiver without giving security is against the settled course of the Court. A trustee is but rarely appointed receiver, and then only on the terms of having no remuneration: *Sykes* v. *Hastings* (1); *In re Thorley* (2). The omission of all mention of remuneration in the judgment amounts to a decision that there was not to be any: *Pilkington* v. *Baker* (3). If there is to be remuneration at all, the evidence shews that the amount allowed is too large.

Warmington, Q.C., and *Strickland*, for Mrs. *Squier's* executors, were not called on.

LINDLEY, L.J.:—

This is an appeal from an order of Mr. Justice *North* allowing a salary to a trustee who had been appointed receiver and manager. The circumstances are these: the testator, who was the proprietor of a music-hall, made a will directing his trustees, of whom Mrs. *Squier* was one, to allow her to carry on the business, with power to put a stop to the carrying it on if it should be unsuccessfully carried on for any period of eighteen months. He then declared that Mrs. *Squier* might, during such time as she carried on the business, retain for her own use one equal fourth part of the net profits, provided such fourth part did not exceed £800 per annum; but if otherwise, she should only be entitled to retain £800 per annum by way of salary. The testator died on the 17th of July, 1888. On the 16th of August in the same year a judgment was given for administration of the estate. By this judgment an inquiry was, among other things, directed, whether it would be for the benefit of the testator's estate that his business should be carried on, and if so in what manner and upon what terms, and if not what should be done in respect thereof, such inquiry to be without prejudice to the right of Mrs. *Squier* to carry on the business for the period of eighteen months. Then Mrs. *Squier* was appointed receiver and manager as from the testator's death, without giving security. The inquiry has not been answered. Its object was to ascertain what

(1) 11 Ves. 363. (2) [1891] 2 Ch. 613.
(3) 24 W. R. 234.

was best to be done about the music-hall. In the meantime the business was carried on and Mrs. *Squier* was employed to carry it on. Having regard to the will, which shewed that the testator trusted her, the Court trusted her, and required no security; but the judgment said nothing about remuneration. The object of this silence, it appears to me, was to reserve the question of remuneration. Mrs. *Squier* does not appear to have elected to carry on the business under the power given to her by the will. She does not claim remuneration under the will, but as receiver and manager appointed by the Court. It is urged against her that the settled practice is not to give remuneration to a trustee who is appointed receiver. The authorities only go to this, that the Court does not generally appoint a trustee to be receiver at all, and that generally he will not receive remuneration if he is appointed. But there is no inflexible rule. We are asked, on the authority of *Pilkington* v. *Baker* (1), to infer that the fact of the judgment saying nothing about salary shews that there was not to be any; but I do not think that the case decides that. Mr. Justice *North* has allowed what he thought reasonable. He had a discretion whether he would allow anything, and I think we ought not to interfere with that discretion, nor as to the amount he has thought it right to allow.

BOWEN and FRY, L.JJ., concurred.

Solicitors: *Lake, Beaumont, & Lake; O. E. Dawson.*

(1) 24 W. R. 234.

H. C. J.

C. A.
1891
Dec. 2.

WHITLEY *v.* CHALLIS.

[1891 W. 3201.]

Mortgage—Receiver and Manager.

Where a receiver is appointed at the instance of a mortgagee over property on which the mortgagor carries on business, the receiver cannot be directed to manage the business unless the business is in express terms or by implication included in the security.

An hotel-keeper who was about to rebuild the hotel, and had an agreement for the grant to him of a lease for eighty years when he had rebuilt it, charged "the said building agreement, and all the premises comprised therein, and the hotel and buildings to be hereafter erected as aforesaid, and the lease so to be granted as aforesaid," with the repayment of a sum borrowed, subject to a prior charge, and agreed to execute to the lender, as soon as the lease was granted, a valid second mortgage, which should be in such form and contain such powers, covenants, and provisions as the solicitor or counsel of the mortgagee should advise or require. The hotel was built, and the mortgagor carried on business on the property, but did not execute any formal mortgage. The mortgagee brought an action for sale or foreclosure, and moved for a receiver. *Kekewich*, J., appointed a receiver to receive the rents of the property and manage the business of the hotel carried on there. The Defendant appealed from this order, so far as it appointed a manager:—

Held, that the security did not charge the goodwill or business, and the provision that the mortgage should be in such form and contain such stipulations as the mortgagee should require did not enlarge the subject of the charge, but only provided for perfecting it; and that the Court could not appoint a manager. The appeal was, therefore, allowed.

Campbell v. *Lloyd's, Barnett's, and Bosanquet's Bank* (1), *Makins* v. *Percy Ibotson & Sons* (2), and *Truman & Co.* v. *Redgrave* (3), explained.

By a memorandum of agreement made on the 22nd of December, 1888, between the Defendant *Challis* of the one part and *W. Maxwell* of the other part, reciting to the effect that *Challis* was about to surrender his existing leasehold interest in the *Royal Hotel, Rupert Street, Covent Garden*, to the landlord, and that *Maxwell* had a mortgage for £700 on this leasehold interest, on which an arrear of interest, amounting to £52 10*s.*, was due; and reciting a building agreement between *Challis* and the landlord, under which *Challis* was to have a lease for eighty

(1) [1891] 1 Ch. 136, n. (2) [1891] 1 Ch. 133.
(3) 18 Ch. D. 547.

years, when he had built an hotel upon the property, in accordance with plans approved by the landlord, and reciting that *Challis* had requested *Maxwell* to surrender his mortgage "in consideration of the said *J. Challis* agreeing to sign these presents for the purpose of giving the said *W. Maxwell* a charge for the said sum of £752 10*s.*, and interest at £5 per cent. per annum, on the said building agreement, dated the 21st of December, 1888, and the premises comprised therein, and the hotel or building to be erected as aforesaid, and the lease to be granted, subject only" to a first charge not exceeding £12,000 for moneys to be advanced to erect the hotel. *Challis* then charged "the said building agreement, dated the 21st day of December, 1888, and all the premises comprised therein, and the hotel or buildings to be hereafter erected as aforesaid, and the lease so to be granted as aforesaid; with the said sum of £752 10*s.*, and interest thereon at £5 per cent. per annum, subject only to advances by the builder or financier for the cost of erecting such new hotel or buildings as aforesaid, up to £12,000, and interest thereon." *Challis* further agreed that he would, at his own expense, procure a lease "of the said premises, hotel, and buildings," to be granted as soon as he could require it, and would then forthwith execute to *Maxwell* a valid second mortgage "of the premises comprised in such lease, either by way of assignment or underlease," for the £752 10*s.*, or so much thereof as should be owing, with interest as aforesaid. "And such mortgage shall be in such form, and contain such powers, covenants, and provisions as the solicitor or counsel of the said *W. Maxwell* shall advise or require." *Maxwell* accordingly surrendered his mortgage on the old leasehold interest.

The hotel was built according to the building agreement, and *Challis* carried on the business of an hotel-keeper in this and some adjoining premises not comprised in *Maxwell's* security. The whole were subject to a mortgage to builders for moneys expended in the building and in alterations. No mortgage was executed to *Maxwell*.

On the 19th of December, 1890, *Maxwell* executed an assignment for the benefit of his creditors. The Plaintiff was the trustee.

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In October, 1891, the Plaintiff commenced this action, asking for foreclosure or sale of this property and some other property on which the Plaintiff claimed a security under a deposit of deeds made by *Challis*, and for a receiver. Shortly afterwards the Plaintiff gave notice of motion for the appointment of a receiver to receive the rents and profits of the hereditaments and premises comprised in the memorandum of the 22nd of December, 1888, and of those comprised in the deposited deeds, and to manage the same.

On the 6th of November, 1891, *Kekewich*, J., made an order that a proper person should be appointed to receive the rents and profits of the premises comprised in the memorandum of the 22nd of December, 1888, "and to manage the business of the hotel carried on upon the said premises," and to receive the rents and profits of the other estates on which the Plaintiff claimed a charge, such appointment not to affect any prior incumbrancers who might think fit to take possession under their respective incumbrances.

The Defendant appealed against this order so far as it appointed the receiver to manage the business.

Micklem, for the appeal:—

The Defendant does not appeal from the appointment of the receiver, but only from the direction that he shall manage the business. The security does not include the business or the goodwill, and the mortgagee cannot have a manager of it.

[He was then stopped by the Court.]

Marten, Q.C., and *Butcher*, for the Plaintiff:—

The Plaintiff has a charge under an instrument which contains an agreement to execute a mortgage containing such stipulations as the solicitor or counsel of the mortgagee shall require. The mortgage, then, was to contain all reasonable agreements, which would include the power to appoint a receiver and manager of the business, for in no other way can full effect be given to a mortgage of an hotel.

[LINDLEY, L.J.:—Do you say that if a person carrying on

business in his own freehold shop, mortgages the shop, the mortgagee can get a receiver of the business?]

Not in the case of an ordinary business, for the shop might be made available by letting it; but the case of a licensed inn is quite different. The present case stands on the same footing as *Campbell* v. *Lloyd's, Barnett's, and Bosanquet's Bank* (1), where a receiver was appointed manager of collieries: *Makins* v. *Percy Ibotson & Sons* (2); *Truman & Co.* v. *Redgrave* (3).

[LINDLEY, L.J.:—In the last case the goodwill and licenses were included in the mortgage.]

The 24th General Order of 1828 directed that a receiver of real estate should manage: *Thornhill* v. *Thornhill* (4).

[LINDLEY, L.J.:—Could you under this security sell the goodwill of the business?]

We say that we could, for the goodwill of an inn is a purely local goodwill—an incident of the house—and the mortgagee could sell the inn as a going concern. Where a mortgagor is in possession he will not be ordered to attorn to the receiver, but to deliver up possession to him: *Hawkes* v. *Holland* (5). If a receiver is to have possession of an hotel, what can he do with it but manage the business carried on there? The insertion of the word "hotel" in the operative part of the document creating the charge tends to shew that there was an intention to charge the business, for the other words comprise the leasehold interest. But if the business is not expressly charged we rely on the principle that where a security cannot be rendered available without the appointment of a manager then a manager will be appointed: *Duke of Grafton* v. *Taylor* (6).

[FRY, L.J.:—What right would the receiver have to use the mortgagor's stock-in-trade and furniture?]

We do not contend that he would have any right to use them; but he could be authorized to carry on the like business with other stock-in-trade and furniture. He might carry on, if

(1) [1891] 1 Ch. 136, n.
(2) Ibid. 133.
(3) 18 Ch. D. 547.
(4) 14 Sim. 600.
(5) W. N. (1881) 128.
(6) 7 Times L. R. 588.

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necessary, the business of a temperance hotel keeper, which would not require a stock of wines.

LINDLEY, L.J.:—

This case raises a question of some interest, though I do not go so far as to say that it presents much difficulty. The Plaintiff *Whitley* may be described with sufficient accuracy for the present purpose as a second equitable mortgagee of some houses in *Coventry Street* and *Rupert Street*. There is a first mortgage, and I suppose the first mortgagee does not care to take possession—his rights are preserved by the order with which we have to deal. Mr. *Whitley* has brought an action in the ordinary form for foreclosure or sale. He has also applied for a receiver and manager. That he should obtain a receiver was almost a matter of course; but the receiver was appointed not only to receive the rents of the premises, but also "to manage the business carried on upon the said premises." The mortgagor appeals on the ground that those words ought to be struck out. In order to solve that question we must look at the rights of the Plaintiff and see what he has got as security. He has not got a legal mortgage; he has got an agreement for a mortgage, and that agreement is the measure of his rights. The mortgagor, Mr. *Challis*, who is the Defendant, had entered into an agreement for a fresh lease of certain land then occupied by four houses of which he was the lessee, he undertaking to build an hotel on the land. He then raised money upon that building agreement, and by an agreement entered into between him and the lender he charged "the said building agreement, dated the 21st of December, 1888, and all the premises comprised therein, and the hotel or buildings to be hereafter erected as aforesaid" ("hotel" there obviously means the building; it is that which is to be comprised in the lease; the word is in itself free from all ambiguity, and it is interpreted by the words which follow, "or buildings"), with £752 10*s.*, subject only to advances to the builder for the cost of erecting such new hotel or buildings. There, again, "hotel" means the physical building. Then *Challis* further agreed with *Maxwell*, the predecessor in title of the Plaintiff, that he, *Challis*, would at his own expense procure a

lease "of the said premises, hotel, and buildings" (there, again, the word "hotel" means the building) when and so soon as such lease could be required in accordance with the said building agreement, and would forthwith make and execute to *Maxwell* a valid and effectual second mortgage of the premises comprised in such lease, (that is, of the land and building), "either by way of assignment or underlease," for the purpose of securing the £752 10*s.*, or so much thereof as should be owing, and that the mortgage should "be in such form and contain such powers, covenants, and provisions as the solicitor or counsel of the said *W. Maxwell* shall advise or require."

That is the agreement which regulates the security which was to be given to *Maxwell* and to which the Plaintiff is entitled; and, stopping there for a moment, I pause to inquire in what shape a legal mortgage would be granted, if a legal mortgage was being settled by the Court and the parties differed. Would such legal mortgage comprise the goodwill and the business of that hotel? Clearly not, and it would be quite impossible under cover of the last words so to enlarge the subject-matter of the security bargained for. I cannot conceive that any conveyancer of the Court would under cover of those words include the goodwill or business in the security, or give the mortgagee any power to carry on the business of the hotel keeper. Those words cannot have the effect of bringing in property which the mortgagor had not agreed to mortgage. The security was intended to be confined to the house and buildings. That being the security, and the only security to which the Plaintiff is entitled, he appears to me to be endeavouring to obtain an enlargement of that security, and to get a benefit to which he is not entitled—a benefit, that is, which he would have had if he had bargained for a mortgage comprising the goodwill of the business of the hotel keeper. Now, in what cases does the Court appoint a manager of a business at the suit of an incumbrancer? The Court does not undertake to manage businesses; and, so far as I know, it never in such a case appoints a manager, as distinguished from a receiver, except with a view to a sale. Here a sale is asked for in the alternative, because this is an action for foreclosure or sale, and if the business had been comprised in the security I should have seen no

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difficulty in making an order for a receiver and manager; but in the present case to give the Plaintiff such an order as he has got is to give him more than his right, and if we were to affirm this order the receiver would be entitled to do what the mortgagee himself is not entitled to do. The radical defect of this order is that it extends the security beyond the bargain. Mr. *Marten* has referred us to several cases, especially the cases of *Campbell* v. *Lloyd's, Barnett's, and Bosanquet's Bank* (1), and *Truman & Co.* v. *Redgrave* (2), in one of which cases a manager of a colliery, and in the other of an hotel, was appointed; but when we look at the nature of the security in each of those cases, we see that the appointment of a manager was perfectly justified. In one case there was a mortgage of a colliery, and in the other case the mortgage expressly included the goodwill of the business. I think that in this case the business is clearly not included in the Plaintiff's security, and the consequence is that this appeal must be allowed, and the Respondent must pay the costs of the appeal.

BOWEN, L.J.:—

I am of the same opinion. I should leave the matter standing on what my learned Brother has said, were it not that my respect for the learned Judge below leads me to express the grounds of my decision.

This order which has been obtained admits, to my mind, of only one construction. It is an order for a receiver and for a manager to manage the old business—to manage the business of the hotel carried on in the premises. I will allude before I finish to an argument of Mr. *Butcher's* which puts a different construction on it. As regards the receiver there is no difficulty. As regards the manager, the first question that arises is whether the business and goodwill are included in the security. The interim management which the manager is appointed to carry out depends, as far as its principle and reason go, upon the jurisdiction of the Court to realize by sale, and you cannot sell more than you have got in your security. We have, therefore, in the first instance to ask, before appointing a manager to

(1) [1891] 1 Ch. 136, n. (2) 18 Ch. D. 547.

manage a business, whether the business is included in the security. The security has been read by the Lord Justice, and I will not go through it again; but it appears to be clear, when you look to the document as a whole, that there is an exclusion from the security of the goodwill of the business. If, indeed, the business and goodwill of the hotel had been included in the security, either by express terms or by implication, then I do not doubt that the Court might in a fit case appoint a manager to manage that which, as being included in the security, those entitled to the benefit of the security might have a right ultimately to sell. But if the business and goodwill of the hotel are excluded from the mortgage, then on what ground can it be said that the Court has jurisdiction to appoint a manager to manage a business which does not belong to the mortgagee? The concluding words of the agreement do not appear to me to assist the Respondent. They are not intended to give a power to enlarge the security; they are only intended to give a power to perfect the security already created. Now, it will be found upon examination that all the cases which have been cited are cases where, either in express terms or by implication, the business and goodwill were comprised in the original security. In the case of a colliery, it follows from the transaction itself that it is the business of the colliery which is the subject of the security. In *Truman & Co.* v. *Redgrave* (1), which was the case of an hotel, the goodwill and business were expressly included in the security. Orders made with regard to landed estates are wholly beside the question. That being so, this order cannot be supported, because it is actually an order which justifies the mortgagee in appointing a manager for the purpose of managing something not included in his security.

Mr. *Butcher* suggested that this order might be read as appointing a manager to manage, not the business of the hotel as now carried on, but to manage a fresh hotel-keeper's business on the premises which it is admitted he is entitled to enter and take possession of. But that is not what the order meant, nor is it what the parties meant when the order was made. The argument of Mr. *Butcher* seems to lead to an absurdity. The person whom

(1) 18 Ch. D. 547.

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the Court would have placed in this somewhat difficult position would have no right to the stock-in-trade, no right to the contracts with the servants, and no right to the use of the furniture; he would therefore have to spend money in replacing the stock and furniture, and it does not appear to me that the expenses so incurred could afterwards be added to the security.

It appears to me perfectly plain that the order appointing a manager is an order made without jurisdiction and cannot be supported.

FRY, L.J.:—

I am of the same opinion. It is attempted to support this order on several distinct arguments: one is, that the goodwill of the business is within the security. It plainly is not within the words describing the subject-matter of the charge, because they appear to me to be confined to the hotel. Then it is attempted to enlarge the subject-matter of the security by the words which provide for the execution of a formal mortgage, and for the insertion in that mortgage of such powers, covenants, and provisions as the solicitor or counsel for the mortgagee shall advise or require. That clause is only intended to give effect to the previous charge, and does not enlarge the subject-matter of the charge. Therefore, it appears to me to be plain that no solicitor or counsel for the mortgagee could successfully insist on any provision including the goodwill of the business. But then it is said that even if the security does not comprise the goodwill of the business, this order ought to be read as equivalent to an order to the manager to enter and to start a new business of an hotel-keeper—and, if necessary, it is suggested of a temperance hotel-keeper—on these premises. Now, I think that the order does not mean that. It means that he is to manage the existing business, and it therefore cannot be supported on that view. But I go further. I do not think there is any authority for the assertion that this Court has jurisdiction in a case of a simple mortgage of lands to direct the receiver appointed at the instance of the mortgagee to start and carry on a new business upon those premises. It is entirely outside the powers of the mortgagee, and entirely outside the

jurisdiction of the Court, to give any such directions. If the mortgagee forecloses his security, he may use the property as he likes. If he enters into possession, he uses the property at his own risk; but he cannot obtain from this Court a direction that the receiver under a mortgage merely charging real estate may start and carry on, at whose expense and at whose risk I know not, an entirely new business. I think, therefore, that this order cannot be sustained, and that the appeal must be allowed.

Solicitors for Appellant: *Trollope & Winckworth.*

Solicitors for Plaintiff: *Ullithorne, Currey, & Villiers,* agents for *W. & G. Burr & Co., Keighley.*

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Railway Company—Copyholds — Enfranchisement — Compensation — Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 95, 96, 97 [*Revised Ed. Statutes, vol. ix., p.* 651, 652].

In 1873 a railway company took copyhold land for the purposes of its undertaking, and erected cottages and works thereon. In November, 1875, a deed of conveyance by the copyholder, under sect. 95 of the *Lands Clauses Consolidation Act,* was entered on the Court Rolls. No steps having been taken by the company to obtain enfranchisement, the lord, in 1887, required the company to enfranchise and pay him compensation. By the custom of the manor a fine of two years' improved annual value was payable on the death of lord or tenant, and a fine of three years' improved annual value on alienation:—

Held, by *Stirling,* J., that the compensation was to be assessed according to the annual value of the land as improved by the company's works:

Held, by the Court of Appeal, that as under sects. 96 and 97 an obligation on the company to procure enfranchisement and an obligation on the lord to enfranchise, arose at the expiration of one month from the entry by the company, or of three months from the inrolment of the conveyance, whichever should first happen, the compensation must be assessed as at that period, without regard to the subsequent improvements made by the company; but that the lord was entitled to the fines which had become payable after that period, and before steps had been taken for enfranchisement, such fines being assessed according to the improved annual value of the land.

THIS was an appeal from a decision of Mr. Justice *Stirling* (1), where the facts will be found fully stated.

(1) [1891] 3 Ch. 443.

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The Defendant company in 1873, under the powers of an Act with which the *Lands Clauses Act*, 1845, was incorporated, took possession of some copyhold lands for the purposes of their undertaking, and erected upon them cottages, and constructed on them a reservoir and other works. Most of these improvements were made before November, 1875. On the 4th of November, 1875, the copyhold tenants executed, under the *Lands Clauses Act*, conveyances by deed of the lands to the company, and these conveyances were inrolled on the Court Rolls on the 16th of the same month, but the company took no steps towards enfranchisement. In January, 1887, the lord of the manor served a notice on the company requiring them to take enfranchisement of the lands and to pay him the compensation. The copyholds were held at fines arbitrary, and by the custom of the manor a fine was payable on the death of a lord as well as of the tenant. The practice was to charge two years' improved annual value on death, and three years' annual value on alienation. Fines on the death of the lord had twice become payable since the company took possession. The amount of compensation having been referred to arbitration, the question arose whether it ought to be assessed on the basis of the unimproved value of the land at the time when the company took possession, or whether regard ought to be had to the improved value of the lands which had been caused by the company's works. Mr. Justice *Stirling* decided in favour of the latter view, and the company appealed.

Sir *H. Davey*, Q.C., *Beale*, Q.C., and *C. Walker*, for the appeal:—

The case turns on sects. 95, 96, and 97 of the *Lands Clauses Act*, 1845. Their effect, as we submit, is that the lord is to be compensated for what he loses by the lands being taken—*i.e.*, such fines as he would have become entitled to if the company had let the lands alone. What has been done is to make the company pay not only this, but an additional amount in respect of works done by them on the land under their statutory powers. Till enfranchisement the company must go on paying all fines that become due. This is a penalty imposed on them in case they delay obtaining an enfranchisement, but it does not follow that they must pay a larger sum for compensation than would have

been assessed at the time when the right to an enfranchisement first arose. The case is analogous to that of entry by the company, under sect. 85, before a price has been ascertained. Suppose the assessment was delayed for some years, such a contention was never heard of as that the company must pay the value of the lands at the time of the assessment, after that value had been enormously increased by improvements made by the company. The point now in question was decided by *Jessel*, M.R., in *In re Marquis of Salisbury and London and North Western Railway Company* (1).

(1) M. R. Dec. 18, 1879.

In re MARQUIS OF SALISBURY AND THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

THE *London and North Western Railway Company* in 1861 and 1863 took from copyhold tenants of the manor of *Wavertree*, of which the Marquis of *Salisbury* was lord, conveyances by deed of certain copyholds required for the purposes of one of their local Acts, each conveyance expressing that until enfranchisement under the *Lands Clauses Act* the land was subject to the rents, suits, and services. These conveyances were duly entered on the Court Rolls.

In 1862 and 1863 the company acquired certain other copyholds of the same manor, which were required for the purposes of the Act, but these copyholds were surrendered to three nominees of the company, who were in fact trustees for the company, and who were admitted.

The company took immediate possession of all the above copyholds, and erected buildings on part of them, but did not for a long time take any steps to enfranchise. Ultimately an agreement, dated the 30th of December, 1876, was entered into between the Marquis and the company for the enfranchisement of the whole. This agreement recited that the first set of copyholds had been conveyed by deed under the *Lands Clauses Act*, and that the deeds had been entered on the rolls; and as to the copyholds which had been surrendered, it was recited: "And whereas the consideration moneys for the surrender of the last-mentioned hereditaments were paid by the said company, and the said [names] were admitted thereto as trustees for the company, and the same hereditaments were acquired by the company for the purposes of the said *London and North Western Railway* (*Edgehill and Garston*) *Act*, 1859, and are now in their possession." This agreement provided "that the price or consideration to be paid by the company to the said Marquis for the enfranchisement hereby agreed to be made shall be such a sum of money as, having regard to the legal and customary or other rights and liabilities of the said parties hereto respectively, and to the recognised usage and practice relating to the enfranchisement of copyhold hereditaments shall, in conformity with these presents, be fixed and determined by *E. D.*, of, &c., an experienced practical surveyor," &c. The question was brought before the Court by summons whether the compensation ought to be assessed on the value of the lands at the time of entry by the company under the

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[FRY, L.J.:—The reservation by the Act of the actual fines to the lord in the interim seems to tend the other way.]

Lands Clauses Act, or on their value at the date of the enfranchisement under the *Copyhold Acts*.

Davey, Q.C., and *Millar*, for the company.

Chitty, Q.C., and *W. W. Karslake*, for the Marquis.

SIR G. JESSEL, M.R.:—

I have no doubt at all that the valuation must take place under the *Lands Clauses Act*, and not under the *Copyhold Acts*. The scope of the *Lands Clauses Act* is this: A railway company is bound to purchase up all the interests in the land which it takes for the purposes of its undertaking, and to do that within a limited time; it cannot take people's property without paying for it. Amongst other interests there are the peculiar rights of the lord of the manor in copyholds. As to those rights there is a special provision to protect the lord. That is the 96th section of the *Lands Clauses Act*, 1845, which is quite independent of the 95th, and which provides that "within three months after the inrolment of the conveyance" (that is, when the company take a conveyance under sect. 95) "of any such copyhold or customary lands, or within one month after the promoters of the undertaking shall enter upon and make use of the same for the purposes of the works, whichever shall first happen," they shall give notice to enfranchise. It was, then, quite immaterial, so far as the lord was concerned, whether they took a conveyance or not, if they once entered and made use of the lands for the purposes of the works; and I hold it is quite plain, considering the purview of these enactments, that the lord would have had a right to come to a Court of justice and compel the company to enfranchise if they once entered for the purposes of the works, and that the rights of the lord and the company were mutual. There was not only an obligation on the company to procure an enfranchisement, but a right in the lord to enforce that obligation.

The first point argued was in a case where the company took a conveyance under the 95th section, the second where they did not take a conveyance, but took a surrender to trustees for them. Suppose, however, that they had done neither, but left the legal estate outstanding in the original copyholder, the Act would still have applied, for within a month of their entering upon and making use of the land for the purposes of the railway they are bound to enfranchise—that is, to buy up the lord's interest. That being so, it appears to me quite plain that their obligation to enfranchise is not got rid of by their neglecting to do it within the month—they are still liable to do it, and the lord is still entitled to enforce it. It was said that the copyholds which were in the names of trustees for the company were in a different position, because it was not shewn that those were taken under the Act at all, and it must, therefore, be assumed that the company were in possession, not under the Act, but under what I will call a private title. The answer to that argument is that it assumes the company to be in unlawful possession, because a railway company has no right to take lands except for the purposes of its Acts and pursuant to the powers of these Acts. If a railway

The scheme of the sections is that the tenant conveys the whole land to the company by a conveyance which does not

company buys land not within the powers of its Acts, it is an illegal act, the possession of the land by the company is illegal, and whatever they do upon the land is illegal. The question, then, is whether under the recitals of the agreement of the 30th of December, 1876, I am at liberty to make such an extravagant assumption as that, and I do not think that I am. The recitals are these: "And whereas the consideration moneys for the surrender of the last-mentioned hereditaments were paid by the company, and the said [names] were admitted thereto as trustees for the company, and the same hereditaments were acquired by the company for the purposes of the said *London and North Western Railway (Edgehill & Garston) Act*, 1859, and are now in their possession." It does not say "acquired under the powers of the Act," it only says "for the purposes of the Act"; but it is difficult to see how a company can acquire for the purposes of the Act, except under the powers of the Act. It was suggested that the words mean intended to be acquired though not actually acquired. But the words when fairly read evidently import that the lands were legally acquired for the purposes of the Act, and the rule being that *omnia præsumuntur ritè esse acta*, unless you have something to shew to the contrary, I am bound so to read the words, and to take it that the company is in lawful possession.

Now as regards the mode of valuing, I do not see, strictly speaking (the fines being fixed), what the value of the land has to do with it, with one exception, and that is that the valuer may no doubt take into consideration the possibility (it is remote, but still it is a possibility) of the lands escheating if they had never been sold to an undying body like the railway company. In that way and to that extent the value of the land may be considered, but in every other respect when there are fixed fines it appears to me that the valuer has nothing to do with the value of the land.

The only other point is the time to which the valuation is to be referred. There is a rule of law which comes in there, that things are to be taken as done within the time within which they ought to be done. The lord is entitled to say to the company, "You should have purchased at that date when you were ordered to purchase by the legislature. At that moment there was an obligation on you to pay for an enfranchisement." At the expiration of the time allowed there are rights settled as between the parties—the company is the owner of the land discharged from manorial rights, and the lord has a title to the purchase-money of those rights. He has to a certain extent, if I may say so, ceased to be lord. I say to a certain extent, because for a temporary purpose he does get the rents and services. It is for the valuer to consider whether he would make the company pay interest or whether the interim receipt of fines, &c., is more than a compensation. I cannot tell that. That is a question for the valuer. He can easily ascertain it though I cannot. It may be the fines are so trifling that they are no compensation at all for the interest on the purchase-money. That he will decide in assessing the compensation.

The question I am asked to answer is whether the compensation is to be assessed on the basis of the value of

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entitle the lord to a fine, and the freehold passes: *Ecclesiastical Commissioners for England* v. *London and South Western Railway Company* (1); but, by a fresh statutory reservation, the lord until the land is enfranchised is to have all the profits of copyhold tenure.. The fines which become payable during the interim may be of larger amount in consequence of the company's improvements, and the company must pay them; but that does not affect the amount of compensation for the value of the land. Increased fines in consequence of improvements made by the company are not fines which are lost to the lord by the company taking the land. The time to be looked for assessment is the time when the company becomes bound to procure enfranchisement and the lord becomes bound to enfranchise.

Hastings, Q.C., and *P. Wheeler*, for the lord of the manor:—

We submit that, on its true construction sect. 95 entirely reserves the rights of the lord, leaving them to be dealt with by sects. 96 and 97. This is the principle adopted by *Maule*, J., in *Ecclesiastical Commissioners for England* v. *London and South Western Railway Company* (2). The lord is to have the same fines as if the property remained copyhold, and if it had remained copyhold the fine would have been assessed according to the existing state of the property with the improvements which have been effected. We say, then, that compensation must in any case be assessed according to the state of the property at the time of the enfranchisement. But, if not, we say that the company at all events cannot go back further than the time of inrolment. Before inrolment the lord has no notice of the transaction, and matters remain in *statu quo*, the property still remaining copyhold: *Ecclesiastical Commissioners for England* v.

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the lands at the time of the entry thereon of the company under the provisions of the *Lands Clauses Consolidation Act*, 1845, or whether such compensation should be based on the value of the lands at the date of their enfranchisement. I would rather say not on the value of the lands at all, but I have no hesitation in saying that in my opinion it is to be assessed on the basis of being assessed at the expiration of one month after the company entered on and made use of the lands.

(1) 14 C. B. 743.

(2) Ibid. 743, 757.

London and South Western Railway Company (1); *Re Wilson's Estate* (2). It is true that sect. 96 says that the enfranchisement is to be effected in a month; but the company are in default for not obtaining it, and ought not to derive a benefit from their own delay. Everything done before inrolment is done upon a property which is still copyhold, and there is no reason why improvements made before that time should not increase the value of the lord's interest as in the ordinary case of a copyholder, where the fines are arbitrary, making improvements upon his tenement. Until the lord receives notice by inrolment of the conveyance his position is in nowise altered. If a copyholder wants to build a mansion he comes for enfranchisement before he builds it; if he builds first he will have to pay more for enfranchisement. The company are seeking to obtain a benefit from their own delay. The Act directs them to obtain enfranchisement, but does not impose on the lord any duty to compel them to do so. In ordinary cases the time to be looked to is the notice to treat. Here the application to inrol is analogous to the notice to treat.

[BOWEN, L.J.:—Does not sect. 95 mean compensation for the loss occasioned by the compulsory power to enfranchise which arises at the end of the month?]

The case before Sir *G. Jessel* was quite different from the present. The fines there were small and certain, and the present point can hardly be said to have arisen.

LINDLEY, L.J.:—

The question raised by this appeal is one of general importance. The facts are simple. The Plaintiff is the lord of a manor in *Cumberland*. The Defendants are a railway company, and they have made their railway through the lands holden of the manor. They entered upon some copyhold tenements held of the manor as long ago as 1873. They settled with the tenants, and on the 16th of November, 1875, inrolled the deed which they took from them. They executed works upon the lands, but they took no proceedings to procure the enfranchisement from

(1) 14 C. B. 743. (2) 3 D. J. & S. 410, 416.

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the lord, and on the 15th of January, 1887, the lord gave them notice to enfranchise. There has been an award, and the arbitrator has estimated and awarded the amount to be paid to the lord in respect of his rights at £980. The controversy between the parties is very neatly stated at page 446 of the report in the Court below: "The contention on behalf of the Defendants was that the compensation ought to be assessed on the basis of the unimproved value of the land at the time when the company first took possession thereof" (I suppose that means a month after taking possession, but nothing turns on that). "For the Plaintiff it was contended on the contrary that compensation ought to be awarded having regard to the improved value of the land which had accrued by reason of the works executed by the Defendants since taking possession." The latter view was adopted by the arbitrators and has been taken by Mr. Justice *Stirling*, and from his decision is the present appeal.

The question turns on the true construction of sects. 95, 96, and 97 of the *Lands Clauses Act*, which relate to the taking of copyholds by public companies. Sect. 95 provides for what is to be done as between the company and the copyholder, and it says in substance that every conveyance to the promoters of any lands which shall be of copyhold tenure shall be entered on the rolls of the manor, and on payment to the steward of such fees as would be due to him on the surrender of the lands to the use of a purchaser he shall make such inrolment, and every such conveyance when so inrolled shall have the like effect in respect of such copyhold lands as if the same had been of freehold tenure. If the section stopped there, the conveyance would extinguish all the rights of the lord. But that was not intended, and the section goes on to say, "Nevertheless, until such lands shall have been enfranchised by virtue of the powers hereinafter contained, they shall continue subject to the same fines, rents, heriots, and services as were theretofore payable and of right accustomed." Now the enfranchisement clauses are clauses 96 and 97. Sect. 96 says that within three months after the inrolment of the conveyance of the lands, or within one month after the promoters of the undertaking shall enter upon and use the same for the purposes of their works, whichever shall

first happen (which are the important words of that section), the promoters of the undertaking "shall procure the whole of the lands holden of such manor so taken by them to be enfranchised, and for that purpose shall apply to the lord of the manor whereof such lands are holden to enfranchise the same, and shall pay to him such compensation in respect thereof as shall be agreed upon between them and him, and if the parties fail to agree respecting the amount of the compensation to be paid for such enfranchisement the same shall be determined as in other cases of disputed compensation." Pausing there for a moment, it is quite obvious from the language of that section, that on the happening of the first of the events mentioned in the section, there is a duty cast upon the promoters to procure enfranchisement, and there is a duty cast upon the lord to enfranchise, and either party can enforce the duty against the other. I take it to be perfectly plain that if the promoters do not proceed to enfranchise, the lord if he chose could obtain a mandamus to compel them to do so. As soon as the first of the two events occurs there arises an obligation to enfranchise. That is the key to the whole matter; the rights of the parties are settled as from that time. The enfranchisement has begun though it is not yet completed. The section then goes on: "And in estimating such compensation the loss in respect of the fines, heriots, and other services payable on death, descent, or alienation, or any other matters which would be lost by the vesting of such copyhold or customary lands in the promoters of the undertaking, or by the enfranchisement of the same, shall be allowed for."

Before commenting on that, I pass on to clause 97, which says how the process of enfranchisement is to be completed: "Upon payment or tender of the compensation . . . , or on deposit thereof in the bank in any of the cases hereinbefore in that behalf provided, the lord . . . shall enfranchise such lands, and the lands so enfranchised shall for ever thereafter be held in free and common soccage." So that in order to complete this process of enfranchisement, the compensation must be ascertained; and it must be paid, or tendered, or deposited according to the circumstances; and then after that there is to be something else done—I suppose a deed of enfranchisement is to be

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executed by the lord—and then, and not before, the lands are completely enfranchised.

Bearing that in mind, in what sense is the expression "or by the enfranchisement of the same" at the end of sect. 96 to be taken? If you take it literally, that is to mean the enfranchisement completed, you get into a vicious circle. The lord loses nothing by the enfranchisement if that word is understood to denote the execution of the enfranchisement deed, for he has had the compensation paid to him. That construction is quite inadmissible. The meaning of the clause is reasonably plain. If you once get it clearly fixed that the duty to enfranchise arises on the happening of the first of the two events mentioned at the beginning of sect. 96, what is lost by that compulsory enfranchisement under the Act is what is to be compensated for. If there is delay, that is provided for, since the lord gets under the last part of sect. 95 the same fines, rents, heriots, and services as were payable under the custom of the manor. Therefore the substance of the enactment seems to me to be, that in order to ascertain what is payable to the lord, you must have reference to the time when the rights of the parties are fixed, and that is the time which the late Master of the Rolls concluded was the correct time in the case of *In re Marquis of Salisbury and London and North Western Railway Company* (1). But without referring to that case, although it is a valuable precedent, I am clearly of opinion that no other view can be supported when you look at the language of these sections. I admit that there is a little ambiguity about the expression "enfranchisement"—for example, in the middle of sect. 96, when it says, "The promoters shall within a month procure the whole of the lands to be enfranchised." You cannot read that literally—that there is a statutory duty on the promoters to procure the lands to be enfranchised in a month. It means that they are to take all proper steps to obtain an enfranchisement; so that notwithstanding the little ambiguity there is about the expression, it appears to me that the true construction of this section is that which I have stated, and the contrary construction seems to me, I confess, to be very startling. The object of the legislature was

(1) *Ante*, p. 75, n.

to compensate the lord for his rights in the land; but the effect of the construction put upon the section by Mr. Justice *Stirling* is not simply to compensate him, but to give him an extravagant profit by reason of the works constructed by the railway company which have not imposed any loss upon him. I do not think that a business-like view of the matter, and I do not think that it is in accordance with the statute.

BOWEN, L.J.:—

I entirely take the same view, and if we had agreed with the Court below, I should not have added a word. It seems to me that the first thing we have to consider is when were the rights of the parties fixed? They were fixed upon the termination of one month after entry by the railway company. The statute says they are to be fixed within three months of the inrolment or within one month of the entry of the railway company, whichever shall first happen; and here the event which first happened was the expiration of a month from the entry. The Act says that when that time comes the promoters shall apply to the lord of the manor to enfranchise the land. It is an absolute obligation upon the company to apply. It is not said that they may apply, but that they shall apply; and the lord, no doubt, as soon as that moment comes has the power, if he chooses, of enforcing that obligation against the company by mandamus. The rights at that moment are ascertained, the relation between the lord and the company as regards those rights is then defined and fixed. That surely must be the period at which the value of the lord's interest in the land ought to be taken.

It is said that a larger sum must be given, for two reasons: first of all, that it is only fair that the railway company should be punished for not fulfilling their duty. That would be rather a strange view to take, because if they have not fulfilled their obligation, the landlord on his part has not insisted on their doing so. Why is he to have an enormous windfall because he has done nothing, and because the company have done nothing? He has lost nothing by the delay; on the contrary, he has gained. Why should he have an extra gain for no reason at all, unless the words of the statute give it him? When we come to

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the words of the statute, the only ground on which such a view could be put forward is that sect. 96 provides that he is to be compensated for what he has lost by the vesting of the lands in the company or by their enfranchisement. By their enfranchisement cannot mean by the execution of the deed of enfranchisement; that is absurd, because the compensation must be assessed and paid before the deed is executed. It seems to me that the words "the enfranchisement of the same" cannot be intended to refer to the time at which the company as a matter of fact apply for enfranchisement, because the statute in its previous part crystallizes the obligation to apply at a particular moment; and upon their true construction those words must have reference to that portion of the statute which makes enfranchisement compulsory. I think that the words "by the enfranchisement thereof" mean by the creation of the right to enfranchisement on the one side, and of the obligation to enfranchise on the other—in other words, by the compulsory enfranchisement provided for by the Act. That seems to me to be the right construction; and I confess that, with the greatest respect for the learned Judge below, of whose judgment nobody on the Bench or at the Bar entertains a higher opinion than I do, I am quite clear in my own mind as to the conclusion to be arrived at.

FRY, L.J.:—

I am of the same opinion. The whole case, as it appears to me, turns on the meaning of the 96th section. That fixes a period of time within which, the company is bound to do something, that is to say, within three months from the inrolment or within one month from the entry, whichever shall first happen. The company are bound by the statute (to use the language of the statute) "to procure" an enfranchisement. That means, at any rate, that they are to take steps to procure the ascertainment of the amount and the execution of the deed. In my opinion, the moment the month from the date of entry expired (for in this case the entry was long before the inrolment of the deed) the lord of the manor had a right by mandamus to compel the company to go forward, and therefore, in my judgment, the expiration of that month is the critical period of time at which the duty arose

in the company—and a right arose in the lord of the manor to have the value of the enfranchisement assessed; and that, I think, is the time at which the value of the lord's interest ought to be ascertained.

Against that, two arguments are addressed to us. One is based on this: It is said, and said truly, that the lord of the manor has no notice, or may have no notice, of what the company has been doing until the inrolment of the deed, and therefore it is suggested it would be unjust that he should be affected by a proceeding of which he knows nothing. There are two answers to that. One is that the statute has said that the time shall run from a particular event, and the duty of the company is irrespective of the knowledge of the lord. But, in the second place, the 95th section has reserved to him the rights to the fines, and all the other fruits of tenure, until the enfranchisement; therefore he suffers no wrong from not knowing his rights. The other argument is one pressed upon us by Mr. *Graham Hastings*. He said that, under the 95th section, until enfranchisement, the amount of the fines goes on increasing with the improvement of the land, and because the interim fines which are saved by the lord go on increasing, therefore he says the amount of compensation ought to increase proportionately. I do not see that there is any relation between the two things. I think it is quite consistent that the compensation should be assessed as at the expiration of a month from taking possession, and that until steps were taken to procure enfranchisement the interim fines should be received by the lord on the footing of nothing having been done by the company. In my view, the amount to be paid on enfranchisement ought to be assessed as at the expiration of one month from the entry.

Solicitors: *Gray, Mounsey, & Fuller*, agents for *Mounsey & Co., Carlisle; Ellis & Ellis.*

H. C. J.

CHITTY, J.
1891
Nov. 13

In re TILLOTT.
LEE *v.* WILSON.

[1891 T. 837.]

Trustee—Cestui que trust—Share of Trust Estate—Consols—Information as to Incumbrances on the Fund.

A *cestui que trust* who is contingently entitled in remainder to a share of Consols standing in the name of a trustee is entitled to obtain from such trustee an authority to the *Bank of England* enabling him to ascertain whether there are any charging orders, stop orders, or distringases upon the trust fund.

MOTION.

James Tillott, by his will dated the 11th of July, 1868, after appointing trustees and executors, bequeathed his leasehold messuages, 12 and 13, *Amherst Road, Hackney*, to his trustees upon trust to pay the net proceeds arising therefrom to his daughter, *Mary Ann Lee*, for her life, and after her decease upon trust for such of her children living at her death, and such issue then living of her children then dead as either before or after her decease should, being males, attain twenty-one, or, being females, should attain that age or marry, and if more than one, as tenants in common according to the stocks; and he devised and bequeathed the residue of his estate to his trustees upon trust, as to one equal third part, to pay the net annual income to each of his three daughters, the said *Mary Ann Lee* being one, during their lives, and on the death of each daughter, as to the share in which she had a life interest, upon similar trusts for their children as those above-mentioned with regard to the leaseholds bequeathed upon trust for *Mary Ann Lee*.

The Plaintiff, being one of the children of *Mary Ann Lee*, who was still alive, commenced this action by originating summons, and asked by his summons that the Defendant, as trustee of the testator's will, might be directed to sign and deliver to the Plaintiff an authority enabling the Plaintiff, his solicitor and agents, to ascertain the amount of Consols standing in the name of the Defendant, and what stop orders and distringases (if any) had been placed thereon, and to produce all deeds, papers, and

documents in his possession relating to the property held by the Defendant as trustee of the will, and to furnish the Plaintiff with a general account of the residuary estate.

By an order made in Chambers dated the 3rd of August, 1891, it was ordered that the Defendant should forthwith write a letter to the *Bank of England* authorizing the Bank to inform the Plaintiff as to the amount of Consols standing in the name of the Defendant, or to verify the same by affidavit, and to produce for the inspection of the Plaintiff all deeds and documents relating to property in which the Plaintiff was interested under the will of the testator. The Defendant accordingly wrote the letter to the Bank, as directed by order.

This was a motion by the Plaintiff that the above order might be discharged or varied, and that the Defendant might be directed to sign and deliver to the Plaintiff, an authority to the Bank, enabling the Plaintiff to ascertain what stops, notices or distringases had been placed on the Consols standing in the name of the Defendant.

P. Wheeler, for the motion:—

It is the duty of a trustee to give his *cestui que trust* on demand, information, or an authority to enable him to obtain information, with respect to the dealings with and position of the trust fund: *Low* v. *Bouverie* (1); *In re Cowin* (2).

The information the Plaintiff has obtained under the order of the 3rd of August, 1891, is not sufficient. The Plaintiff is entitled to ascertain whether there is any stop or distringas on the fund.

It may be that there is an incumbrance on the fund which is paramount to the title of the trustee. The trustee may have purchased the stock from a person who had no power to sell.

I submit the Plaintiff is entitled to the order he asks for.

Waggett, for the Defendant:—

The trustee has given the Plaintiff all the information he is entitled to.

If the trustee gives the authority to the Bank as now asked

(1) [1891] 3 Ch. 82. (2) 33 Ch. D. 179.

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for, the Plaintiff, who is only entitled contingently to one-twelfth of the Consols, will obtain information as to the dealings of the other *cestuis que trust* with their shares, and that information the trustee has no right to give him. A distringas is merely a notice to the Bank, and does not affect the title to the stock. No charging order can have been given by the Defendant which could affect the Plaintiff's title. The Defendant could not effectually charge the stock standing in his name but not in his own right. The Plaintiff must know what incumbrances he has himself created. I also rely on *Low* v. *Bouverie* (1).

CHITTY, J.:—

In pursuance of an order made in Chambers the Defendant has written a letter to the Bank, on the authority of which the Bank has given to the Plaintiff information which shews that a sum of stock is actually standing in the name of the trustee. The Plaintiff, however, requires something more; he asks for an authority which will enable him to obtain information from the Bank as to whether there are any stop orders on the fund: his object in asking for this information is to deal with his own share in the trust estate, his share being one-twelfth, to which he is entitled contingently on the death of his mother. It is no part of the duty of a trustee to assist his *cestui que trust* in mortgaging, or, as Lord Justice *Lindley* added, "in squandering or anticipating his fortune," *Low* v. *Bouverie* (2), but a trustee is bound to give his *cestui que trust* proper information as to the investment of the trust estate, and where the trust estate is invested on mortgage, it is not sufficient for the trustee merely to say, "I have invested the trust money on a mortgage," but he must produce the mortgage deeds, so that the *cestui que trust* may thereby ascertain that the trustee's statement is correct, and that the trust estate is so invested. The general rule, then, is what I have stated, that the trustee must give information to his *cestui que trust* as to the investment of the trust estate. Where a portion of the trust estate is invested in Consols, it is not sufficient for the trustee merely to say that it is so invested, but his *cestui que trust* is entitled to an authority from the trustee to enable

(1) [1891] 3 Ch. 82. (2) [1891] 3 Ch. 82, 99.

him to make proper application to the Bank, as has been done in this case, in order that he may verify the trustee's own statement; there may be stock standing in the name of a person who admits he is a trustee of it, which at the same time is incumbered, some other person having a paramount title may have obtained a charging order on the stock or placed a distringas upon it.

The question here is whether the *cestui que trust* is not entitled, in addition to the information that he has obtained, to the further authority to the Bank for information which will, besides verifying the trustee's statement, that the trust money is invested in the stock, also enable him to ascertain that the stock is free from incumbrance or free from any paramount claim. In the case before me there is no suggestion that the trustee is wrong, there is no charge of any sort made against him, though Mr. *Wheeler* tried to suggest a possible case and did suggest that there might be some kind of paramount claim affecting the stock in question, yet there is no suggestion to be found on the evidence in the case, but still, I think, now that the matter has been brought before me and discussed, that the *cestui que trust* is entitled to the further information that he now asks for, which will enable him to go back with an authority from the trustee, on which the Bank will shew that the fund is either clear of all distringases and the like or that it is not. I quite agree with what fell from counsel for the Defendant that this may give the Plaintiff more information than he is entitled to ask, because as there are twelve shares in this fund, it may be that there are several distringases on the fund obtained by persons who have charges on the contingent interest of the other persons, and it is clear that the trustee is not bound to give the *cestui que trust* of one share any information as to the dealings of the other *cestui que trust* in whose share he has no interest, shewing whether those shares are or are not incumbranced. I think, then, for these reasons, that there ought to be a further order in the terms the Plaintiff asks for, but the Plaintiff must pay the costs of the motion.

Solicitors: *Steadman, Van Praagh & Sims; Van Sandau & Co.*

G. M.

CHITTY, J.

1891
Nov. 14.

In re DAVIES' POLICY TRUSTS.

Married Women's Property Act, 1870 (33 & 34 *Vict. c.* 93), *s.* 10—*Policy of Life Assurance—Wife and Children—Joint Tenants.*

A policy was taken out on the life of the assured for the benefit of his wife and children, pursuant to the *Married Women's Property Act*, 1870.

The assured died, leaving a widow and five children :—

Held, that the widow and children took the moneys payable under the policy as joint tenants.

In re Seyton (1) followed.

The *dictum* in *In re Adam's Policy Trusts* (2) not followed.

PETITION.

In February, 1877, *John Evan Davies*, under the provisions of the *Married Women's Property Act*, 1870, effected a policy of assurance on his own life with the *London and Lancashire Assurance Company* for the sum of £500, and it was declared by the policy that the funds and property of the company, according to the provisions of the deed of settlement thereof, should be liable to the payment of the sum of £500 to the wife and children of the said *John Evan Davies*, pursuant to the provisions of the *Married Women's Property Act*, 1870.

John Evan Davies died in April, 1891, intestate, and administration of his estate was granted to his widow, *Margaret Davies*, whom, together with five children only, he left surviving. The assured did not by the policy or otherwise make any provision for the appointment of a trustee or trustees of the moneys payable under the policy.

This was a petition by *Margaret Davies*, the widow, for the appointment of trustees and for a declaration of the rights of herself and her children in the policy moneys.

Upjohn, for the Petitioner :—

[CHITTY, J., having stated that he had no jurisdiction to declare the rights on a petition, it was agreed, with the approbation of the Judge, that an action should be commenced by

(1) 34 Ch. D. 511. (2) 23 Ch. D. 525.

originating summons, the petition proceeding on that footing, the order to be dated after the issue of the summons.]

In *In re Adam's Policy Trusts* (1), where the words were similar to those here, "for the benefit of his wife and children," your Lordship inclined to the opinion that the policy should be read in conjunction with sect. 10 of the *Married Women's Property Act*, 1870, and should by virtue of the words "separate use" in the section be construed as giving the wife a life interest only, with remainder to the children; but your Lordship did not absolutely decide the point, as in that case the wife had predeceased the husband.

In *In re Seyton* (2), where the words in the policy were similar to those here, Mr. Justice *North* held that the widow and children took as joint tenants, and I submit that the decision in that case is correct.

[He also referred to *In re Mellor's Policy Trusts* (3) and *Newill* v. *Newill* (4).]

W. Evans, for the children.

CHITTY, J.:—

In the case of *In re Adam's Policy Trusts* I only stated my view as to what the rights of the widow and children were, without absolutely deciding the point, it being in the circumstances of that case unnecessary to do so. But as in *In re Seyton*, where the words, "for the benefit of his wife and children," occurred, Mr. Justice *North* has, having had all the authorities brought to his attention, decided that the widow and children of the assured took as joint tenants, I feel myself bound to follow that decision; and I therefore hold that Mrs. *Davies* and her children take the moneys payable under this policy as joint tenants.

Solicitors: *Morgan, Son, & Upjohn.*

(1) 23 Ch. D. 525.
(2) 34 Ch. D. 511.
(3) 6 Ch. D. 127; 7 Ch. D. 200.
(4) Law Rep. 7 Ch. 253.

G. M.

CHITTY, J.
1891
Nov. 21, 28.

CUMBERLAND UNION BANKING COMPANY *v.* MARYPORT HEMATITE IRON AND STEEL COMPANY.

[1891 C. 844.]

Practice—Sale of Property—Sale out of Court—Reserved Biddings and Remuneration of Auctioneer to be fixed by Judge—Form of Order—Declaration as to Persons entitled—Rules of Supreme Court, 1883, *Order* LI., *r.* 1A.

In a foreclosure action an order was made for the sale of the mortgaged property by the Plaintiffs out of Court, but the reserved biddings and the remuneration of the auctioneer were to be fixed by the Judge, and the proceeds of sale were to be paid into Court by the Plaintiffs.

The Court prefaced the order with the declaration, required by rule 1A of Order LI. when the proceedings are "altogether out of Court," that the Court was satisfied by the evidence that all persons interested in the estate to be sold were before the Court.

MOTION by the Plaintiffs for judgment.

The Plaintiffs were mortgagees of several leasehold properties belonging to the Defendants, the mortgages having been given to secure the balance due on the Defendants' current account with the Plaintiffs, who were their bankers. Part of the property comprised in the Plaintiffs' mortgages was subject to a prior mortgage.

As a further security the Defendants had issued to the Plaintiffs fifty debentures, each for the sum of £1000. These debentures charged the undertaking of the Defendant company and all their property whatsoever and wheresoever, both present and future, including their uncalled capital for the time being. No other debentures had been issued by the Defendants. One of the terms of the debentures was, that the principal moneys thereby secured should become immediately payable on an order being made, or an effective resolution passed, for the winding-up of the Defendant company. The company had resolved on a voluntary winding-up, and an order had since been made by Mr. Justice *North* that the voluntary winding-up should be continued subject to the supervision of the Court.

This action was brought by the Plaintiffs to realize their securities by foreclosure or sale. The prior mortgagee was not made a party to the action, as the Plaintiffs did not claim any relief against the property comprised in his security.

A receiver and manager had been appointed on the application of the Plaintiffs.

Two orders for the sale of two of the properties comprised in the Plaintiffs' mortgages had been made by the Vacation Judge in Chambers, dated respectively the 2nd of September, and the 13th of October, 1891. Both these orders directed that the property to be sold should be sold by the Plaintiffs out of Court, the reserved biddings and the remuneration of the auctioneer to be fixed by the Judge, and the proceeds of sale to be paid into Court by the Plaintiffs. In neither case was the order prefaced by the declaration with which rule 1A of Order LI. requires that the order should be prefaced when the proceedings are "altogether out of Court," viz., that "the Judge is satisfied, by evidence, that all persons interested in the estate to be sold are before the Court or are bound by the order for sale."

Nov. 21. The case was in the paper this day as a short cause upon motion for judgment by the Plaintiffs. Minutes had been prepared, to which the Defendants consented. These minutes followed the form of the prior orders made by the Vacation Judge.

Cozens-Hardy, Q.C., and *E. Page*, for the Plaintiffs:—

The proceedings in this case will not be "altogether out of Court," for the Court will retain a certain amount of control over them. It is unnecessary, therefore, that the order should be prefaced by the declaration mentioned in rule 1A of Order LI. The precedent of the two prior orders should be followed.

J. G. Wood, for the Defendants.

CHITTY, J., thought that he had jurisdiction to order a sale out of Court, retaining the power of fixing the reserved biddings and the remuneration of the auctioneer. The declaration applicable to a sale altogether out of Court would be omitted, for otherwise he should be casting doubt on the validity of the previous orders made in the action.

The Registrar felt some difficulty about drawing up the order, and Mr. Justice *Chitty* directed that the case should be placed in the paper again.

CHITTY, J.
1891
CUMBERLAND UNION BANKING COMPANY v MARYPORT HEMATITE IRON AND STEEL COMPANY.

Nov. 28. *Cozens-Hardy*, Q.C., and *E. Page*, for the Plaintiffs.

J. G. Wood, for the Defendants.

CHITTY, J.:—

When this case was before me last week, I was under the impression that the previous orders for sale had been made by Mr. Justice *North* himself. I now find that they were both made during the Vacation in Chambers, and that Mr. Justice *North* has not expressed any opinion that the preliminary declaration ought not to be inserted in such a case as the present. I was also under the impression that in another similar case Mr. Justice *Kekewich* had thought it unnecessary to preface the order with the declaration. But I have now ascertained that Mr. Justice *Kekewich* has expressed an opinion, that, when an order for sale is made in this form, the proceedings are "altogether out of Court," and that he directed the Registrar to preface the order with the declaration. I should like to consider the point with the other Judges of the Chancery Division. But it is very important that the practice should be uniform, and as Mr. Justice *Kekewich* has in a similar case solemnly directed the Registrar to insert the declaration, and as an order in that form has found its way into *Seton* on Decrees (1), I think I had better follow this precedent. There is evidence that all the parties interested in the estate to be sold are before the Court.

Cozens-Hardy:—It is not proposed to sell that property which is subject to the prior mortgage. There is no difficulty except by reason of the two previous orders.

CHITTY, J.:—Without absolutely binding myself for the future, I think it is better that I should follow the order of Mr. Justice *Kekewich*. I think there is a great deal to be said for the other construction of the rule; but it is very undesirable that different Judges should adopt different forms of order in precisely similar cases.

Solicitors: *Harrison & Powell; Helder & Roberts.*

(1) 5th Ed. vol. i. p. 288.

W. L. C.

In re ROBINSON. WRIGHT *v.* TUGWELL.

NORTH, J.
1891
Nov. 3.

[1889 R. 1854.]

Will—Charitable Legacy—Gift for Endowment of Church—Continuing Condition—Retention of Fund in Court.

A testatrix by her will bequeathed £1500 towards the endowment of a church, provided certain conditions were carried out, and under this stipulation alone was her executor empowered to pay it. One of the conditions (which the testatrix called an "abiding condition,") was "that the black gown shall be worn in the pulpit, unless there shall be any alteration in the law rendering it illegal."

The fund being in Court in an action to administer the estate of the testatrix:—

Held, that the condition was not impossible or illegal; but that, as it was a continuing condition, the fund must be retained in Court and the income of it paid to the incumbent of the church, if he should comply with the condition; and liberty was reserved to him to apply for payment of the income.

FURTHER consideration of an action for the administration of the estate of *Frances Rebecca Robinson*, widow of the Rev. *Disney Robinson*, who died on the 27th of August, 1889.

By her will, dated the 31st of July, 1889, she bequeathed a sum of £1500 "towards an endowment for a proposed Evangelical Church at *Bournemouth*, to be placed in *Peache* Trust and *Disney Robinson* advowson, provided conditions as laid down for *Christ Church*, *Paignton*, are carried out in every particular, which Colonel *Wright* fully understands, and under this stipulation alone is my executor empowered to pay it."

The testatrix appointed Colonel *Wright* (the Plaintiff in the action) her sole executor.

The Chief Clerk by his certificate found to the following effect:—

A trust, known as the "*Peache* Trust," was created by a deed dated the 24th of November, 1877, one of the parties to which was the Rev. *Alfred Peache*, and by this deed the advowsons and rights of patronage and presentation of and to certain rectories, vicarages, or incumbencies were vested in trustees, upon trust,

NORTH, J.
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when any of the said rectories, vicarages, or incumbencies should become vacant, to nominate and appoint to the same a person qualified as thereby provided.

The testatrix in her lifetime conveyed to the *Peache* trustees certain advowsons belonging to her upon the trusts declared by the deed of the 24th of November, 1877, subject to a proviso that, in every nomination, appointment and deed, account, transaction or dealing with the said advowsons in the administration of the trusts and appointments thereby declared, such advowsons should be respectively called "The *Disney Robinson Memorial Livings*."

The testatrix in the year 1887 contributed £1500 towards the endowment of the new church of *Christ Church, Paignton*, which sum was paid by her to the Ecclesiastical Commissioners for *England* when the new church was completed and consecrated, and the new parish assigned, and such assignment duly advertised in the *London Gazette*, and the Commissioners at the same time contributed for the purpose of the endowment the like sum of £1500. The patronage of the new church was vested in the *Peache* trustees, under the designation of the trustees of *Christ Church, Paignton*. The conditions on which the testatrix made her gift towards the endowment of *Christ Church, Paignton*, were as follows, viz.:—(1) That a suitable site for the proposed new church should be obtained or given; (2) that endeavour should be made to get a like sum of £1500 to be contributed for the same purpose by the Ecclesiastical Commissioners; (3) that the said sum of £1500 should be paid if and when the new church should be completed and consecrated and the new parish assigned, and such assignment notified in the *London Gazette*; (4) that the right of patronage and presentation to the living of the church should be vested in the *Peache* trustees; (5) that the new benefice to be created as aforesaid should be deemed to be one of the *Disney Robinson* memorial livings; and (6) that the services of the new church should be in accordance with the wishes of the testatrix, as defined in a letter which was addressed by her to the committee for the building of the new church at *Bournemouth*, which letter was as follows:—

"I propose endowing the new church at *Bournemouth* with the

sum of £1500, trusting this will be met by a similar amount from the Ecclesiastical Commissioners, on the condition that the gift of the said church shall after my decease be placed in the hands of the *Peache* and *Disney Robinson* Trust. I need hardly say that my object is to secure sound evangelical doctrine, and I wish that the services should be of that plain simple character laid down for the Reformed Protestant Church of *England.* I make it an abiding condition that the black gown shall be worn in the pulpit, unless there shall be any alteration in the law rendering it illegal. I wish that the linen cloth should be spread over the Communion Table at the administration of the Holy Communion. The services as administered at all my churches I trust will be carried out, that there shall be no increase in musical performances, termed choral services, no public organ recitals held in the church, no chanting the psalms and versicles; but the music itself cannot be too good to lead the congregation in singing and praising God with one heart and voice to His glory."

A new ecclesiastical district or parish was formed out of the parish of *St. Clement's, Bournemouth,* by order of Her Majesty in Council, on the recommendation of the Bishop and the Ecclesiastical Commissioners, under the provisions of the *New Parishes Acts,* and in consequence of the recommendation of the said committee, based on the offer made by the testatrix, and the patronage of the new church was assigned to the *Peache* trustees.

Before the new parish could be formed the consent and recommendation of the Ecclesiastical Commissioners and of the Bishop had to be obtained, and before the Commissioners would give such consent, they required as a condition precedent that an endowment fund of £5000 should be raised, of which fund they offered to provide, and afterwards did provide, £1000. An endowment and building fund was raised by the committee by subscriptions, and £4000, part thereof, was paid by them to the Commissioners, relying on receiving the £1500 promised by the testatrix to replace part of that fund which would otherwise have been applied towards building the church. The approval of the Ecclesiastical Commissioners of the formation of the new parish was notified in the *London Gazette* of the 22nd of August, 1890. An Order in Council, dated the 13th of August, 1890, was made,

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which contained a recital of a scheme dated the 31st of July, 1890, whereby the Commissioners recommended and proposed that that part of the parish of *St. Clement's*, which was described in a schedule, should be constituted a separate district for spiritual purposes, and should be named "The District of *St. John the Evangelist, Boscombe.*" And it was further recommended and proposed that the whole right of patronage of the district so to be constituted, and, when such district shall have become a new parish, then of the said new parish, and of the nomination of the minister or incumbent thereof should, without any assurance other than the said scheme, and any duly gazetted order in council ratifying the same, and upon and from the day of the date of the publication of such order in *London Gazette*, be assigned to and be absolutely vested in, and should and might from time to time be exercised by, five persons therein named (who were the *Peache* trustees), their heirs and assigns; and it was thereby ordered that the said scheme should be ratified, and that the same and every part thereof should be effectual in law immediately from and after the time when the order should have been duly published in the *London Gazette*. A church had been erected in the district, and the *Peache* trustees had appointed an incumbent.

The Chief Clerk also found that the £1500, if payable, would be payable to the Ecclesiastical Commissioners, as part of the endowment fund for the new church.

It did not appear by the certificate whether the church had been consecrated, but it was stated at the Bar that it had not.

One of the questions raised was, whether the £1500 was immediately payable out of the estate of the testatrix, and, if so, to whom.

Everitt, Q.C., and *Morshead*, for the Plaintiff.

Brice, Q.C., and *Dibdin*, for the *Bournemouth* Church Committee:—

The condition as to the use of the black gown is fulfilled if that gown is *bonâ fide* worn now by the incumbent of the church. The gift will become absolute when it is once accepted. When

the gift has become perfect the condition will be got rid of, and the gift cannot afterwards be recalled, even if the condition be not fulfilled: *Attorney-General* v. *Christ's Hospital* (1). In *Shuldham* v. *Royal National Lifeboat Institution* (2), a similar condition was construed as a trust, and it was held that the institution, having accepted the trust, was entitled to the legacy.

[NORTH, J.:—In both those cases the fund was to be paid to the particular institution, and it was accepted on a trust. If in the present case the money is to be paid to the Ecclesiastical Commissioners, how would that principle apply to them? They would have no control over the incumbent.]

The testatrix had in view conditions which were capable of being completely performed before the money was paid over by her executor. The condition as to the use of the black gown is not capable of being so performed; it is a continuing condition. In *Baldwin* v. *Baldwin* (3), Lord *Romilly*, M.R. (4), expressed an opinion that the interposition of trustees would make no difference.

In the case of a legacy of personal estate, if there is a condition precedent which is originally impossible, the bequest is absolute, just as if in the case of real estate the condition had been subsequent: *Jarman* on Wills (5). What the testatrix has said should be regarded rather as an expression of her wish than as a strictly legal condition.

It may indeed be said that the condition is illegal, because it is an attempt to bind the discretion of the ordinary, who has a control over the services of the church.

Cozens-Hardy, Q.C., and *Vernon R. Smith*, for the next of kin of the testatrix:—

The certificate shews that the conditions imposed by the testatrix have not been fulfilled. The Ecclesiastical Commissioners will not and cannot accept the bequest on such terms.

It would be illegal for a clergyman of the Church of *England*

(1) 1 Russ. & My. 626.
(2) 35 W. R. 710.
(3) 22 Beav. 419.
(4) Ibid. 425.
(5) 4th Ed vol. ii. p. 12.

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to bind himself not to do that which the ordinary might direct him to do.

The conditions are too vague and uncertain, and the Court should declare that they have not been and cannot be complied with, and that the gift is void and fails to take effect.

Brice, in reply :—

If the condition is originally and *ex facie* impossible and illegal it will be struck out, and then the gift will stand.

NORTH, J.:—

I cannot fully assent to the arguments on either side. The question is simply what ought now to be done with this sum of £1500. [His Lordship read the terms of the gift and stated the findings of the Chief Clerk, and continued:—] The £1500 is given for the endowment of the church, and the executor can only properly pay it to a person or body of persons properly constituted to receive the money. If the gift is good in other respects the Court will take care that it shall not fail for want of a trustee. The "endowment" of a church means that the income only of the fund is to be applied for the benefit of the incumbent; that is the main object of an endowment. The conditions on which the testatrix made the gift are stated by the Chief Clerk under six heads. According to his finding the first condition has been fulfilled. I am satisfied that the second condition has also been fulfilled; if necessary I should retain the fund in Court till it had been fulfilled. As to the third condition I am told that the church has been completed, but that it has not yet been consecrated. The legacy could not of course be paid till that had been done. Then the fourth condition is satisfied, for the right of patronage and presentation to the living has been vested in the *Peache* trustees. The fifth condition creates no difficulty. Then comes the sixth condition as to the services of the church, with regard to which the wishes of the testatrix are to be found in her letter to the committee. She makes the use of the black gown in the pulpit "an abiding condition." I do not know whether she means the other things which she mentions to be "abiding" conditions or not. Is there

anything to prevent this condition from taking effect? I can see nothing illegal in it. It is said that it will fetter the power of the incumbent as to the mode of conducting the services of the church; I cannot see that. But I do not see how I can order the capital fund to be paid out of Court, for the condition as to the use of the black gown is a continuing condition. I can direct that the fund be carried over to a separate account, and the income be paid to the incumbent from time to time, while he performs the condition. This is the course which I shall adopt, and I shall reserve liberty to the incumbent to apply for the payment of the income to him.

BENGAL SECRETARIAT LIBRARY.

Solicitors: *Bridgman & Willcocks; West, King, Adams & Co.; Paterson, Snow & Co.*

W. L. C.

BODEN *v.* HENSBY.

[1891 B. 2639.]

Solicitor—Lien—Partition Action.

Where in a partition action the Plaintiff had changed his solicitor, the old solicitor was ordered to deliver documents, come to his hands since the commencement of the action and for the purposes of the action, to the new solicitor, to be held by the latter subject to the lien of the former, and returned when the Judge should direct.

THIS was a partition action relating to freehold and leasehold property to which *Ann Boden* and *Arthur Ernest Hensby*, the Plaintiff and Defendant, were entitled in equal shares. Judgment was given on the 21st of July, 1891, directing the usual inquiries in a partition action.

Messrs. *Barton & Pearman* were the solicitors of the Plaintiff in the first instance. In November, 1891, her solicitors were changed to Messrs. *P. J. Gordon & Son.* On the 30th of November, 1891, an order was made in Chambers that Messrs. *Barton & Pearman* should deliver up to Messrs. *P. J. Gordon & Son* such deeds, papers, and writings in their custody or power as might be necessary for the conduct of this action; that the documents delivered up should be retained by *P. J. Gordon &*

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Son subject to the lien, if any, of Messrs. *Barton & Pearman*, and be returned to them if and when the Judge should direct.

A motion was now made on the part of Messrs. *Barton & Pearman* to discharge the order of the 30th of November.

Howard, for the motion:—

As a rule, when a man changes his solicitor in an action, the documents in the hands of the old solicitor cannot be taken out of his custody till the costs of that solicitor are paid: *In re Faithfull* (1), *Ex parte Yalden* (2). There is an exception in the case of an administration action or representative proceedings such as winding up: *In re Boughton* (3), *In re Capital Fire Insurance Association* (4): but then only of documents come to the hands of the solicitor in the progress of the action for the purpose of the action. This is not a representative action; there are two parties whose interests are not common: one seeks a sale, the other partition.

Serrell, for the Respondent, the Plaintiff:—

This action is in the nature of an administration action; the object of the action is to deal with property in which the parties have a common interest, the question between the parties being merely how the property is to be administered. The Court can not assume that there are only two parties interested. The documents in question relate to the affairs of another person, or other persons than the Plaintiff; the Plaintiff's solicitors therefore cannot have an exclusive lien.

Howard, in reply.

NORTH, J.:—

I think a distinction must be taken between the documents come to the hands of the solicitor since the commencement of the action and prior to the action. In the case of the *Capital Fire Insurance Association* such distinction was taken, and I must observe it here. The Order in Chambers was made by the

(1) Law Rep. 6 Eq. 325.
(2) 4 Ch. D. 129.
(3) 23 Ch. D. 169.
(4) 24 Ch. D. 408.

Chief Clerk on the authority of *In re Boughton* (1); but the rule in that case does not apply to documents come to the hands of the solicitor previously to the action. As to the documents come to the hands of the solicitor for the purpose of carrying on the action, *In re Boughton* does apply, and the order of the Chief Clerk in Chambers will stand. The rule does not apply merely to actions for the administration of the estate of a deceased person; it is applicable to an action for the administration of the trusts of a deed, and to other proceedings of a representative character. This action, in my opinion, is one to which the rule is applicable. It is not so clear as Mr. *Howard* says, that there are only two persons interested in the property. If it were, the Court would not have directed an inquiry as to incumbrancers. It is quite clear, as far as I can see, that only two persons are interested under the will; but the Court wishes to know who the incumbrancers of both Plaintiff and Defendant may be. It seems to me that this action is one in which other persons may be interested just as much as in an administration action, and that, subject to the distinction drawn in *In re Capital Fire Insurance Association* (2), *In re Boughton* applies. Though that is a recent case, it is one that has been frequently acted upon. The proper Order will be that Messrs. *Barton & Pearman* deliver up to the Plaintiff's present solicitors such documents as have come to their hands during the progress of and for the purposes of the action, subject to the lien provided by the Order. As the Applicants have succeeded in part and failed in part, I think there should be no costs of this application.

Solicitors for Applicants: *Barton & Pearman.*
Solicitors for Respondent: *P. J. Gordon & Son.*

(1) 23 Ch. D. 169. (2) 24 Ch. D. 408.

D. P.

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In re CASEY'S PATENTS.
STEWART *v.* CASEY.

[1890 S. 2069.]

Letters Patent—Co-owners—Equitable assignment of a Share—Registration—Documents of Title, Custody of—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict.* c. 57), ss. 23, 85, 87, 90—*Patents Rules,* 1883, *rr.* 65, 68, *Form L—Contract—Consideration—Past Services.*

An equitable assignment of a patent or a share or interest in it may be put upon the register.

A. and *B.*, joint owners of certain patents, wrote to *C.* as follows: "In consideration of your services as the practical manager in working both our patents . . . . we hereby agree to give you one-third share of the patents, the same to take effect from this date." *A.* and *B.* afterwards deposited the letters patent with *C.* to assist him in effecting a sale of the patents, which however did not take place. *C.* registered the above letter, and claimed to retain possession of the letters patent as a co-owner of a third share therein:—

Held (affirming the decision of *Romer*, J.), that sect. 85 of the *Patents, Designs, and Trade Marks Act* only excludes notices of trusts; and that the letter was an immediate equitable assignment of an interest in the patent, not defective for want of consideration, and was properly entered on the register.

ON the 28th of July, 1887, two letters patent, Nos. 10,512 and 10,513, were granted to *J. Stewart* and *T. Charlton*, the one for "Improvements and means and appliances for storing volatile or inflammable liquids," and the other for "Improvements in and appliances or vessels for storing, or storing and transporting, volatile or inflammable liquids."

Subsequently *J. Stewart* and *T. Charlton* entered into arrangements with the Defendant, *J. Casey*, to introduce their patents to the mercantile world, and he spent some time and money in pushing, developing, and improving the inventions. Ultimately, on the 29th of January, 1889, *J. Stewart* and *T. Charlton* signed the following document in favour of the Defendant *J. Casey*.

"*James Casey*, Esq.,
"10, *Philpot Lane, E.C.*
"*Stewart* and *Charlton's* Patents.

"Dear Sir,—We now have pleasure in stating that in consideration of your services as the practical manager in working

both our patents as above for transit by steamer or for any land purposes, we hereby agree to give you one third share of the patents above-mentioned, the same to take effect from this date. This is in addition to and in combination with our agreement of the 29th November last."

In June, 1889, *J. Stewart* and *T. Charlton* handed the letters patent for both their said inventions to the Defendant *Casey* to assist him in some negotiations which he was then carrying on for a sale of the patents, but a sale was not effected.

J. Stewart died in September, 1889, and the Plaintiffs *Isabella Stewart* and *Ernest Stewart* were the executors of his will; and they and the Plaintiff *T. Charlton* subsequently applied to the Defendant *Casey* to return them the letters patent, but he claimed to retain possession of them as a owner of a third share in the patents, and in December, 1889, he registered the letter of the 29th of January, 1889. The letter was entered on the register at full length; and there was also on the list of proprietors of patents an entry referring to the letter and stating that the Defendant claimed an interest in the patent under that document.

This action was commenced in June, 1890, and claimed from the Defendant *Casey* delivery up of the letters patent, and damages for their detention.

The Plaintiffs also gave a notice of motion to rectify the register by expunging therefrom the entry of the letter of the 29th of January, 1889.

The action and the motion were directed to be heard together (1).

(1) The following are the sections of the 46 & 47 Vict. c. 57, specially referred to in the argument:—

Sect. 23: "(1) There shall be kept at the Patent Office a book called the Register of Patents, wherein shall be entered the names and addresses of grantees of patents, notifications of assignments and of transmissions of patents, of licenses under patents, and of amendments, extensions, and revocations of patents, and such other matters affecting the validity or proprietorship of patents as may from time to time be prescribed.

"(2) The Register of Patents shall be *primâ facie* evidence of any matters by this Act directed or authorized to be inserted therein.

"(3.) Copies of deeds, licenses, and other documents affecting the proprietorship in any letters patent, or in any license thereunder, must be supplied to the Comptroller in the prescribed manner for filing in the Patent Office."

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They were heard before Mr. Justice *Romer* on the 8th of June, 1891.

E. M. Daniel, for the Plaintiffs:—

The letter is an executory agreement, and not capable of registration. It was intended that when the Defendant had rendered certain services he was to have a share in the patents, and the patentees would be trustees of that interest for him, but he has not rendered those services. But if it is an equitable assignment, then it is not a document which the Legislature contemplated should be registered. It is not an assignment of the patent within the terms of sect. 23 of the *Patents, &c., Act*, 1883, and of rules 65–68 of the Patents Rules, 1883, which are based on the section. No trust is to appear on the register, sect. 85; and entry on the register gives a legal right to deal with the patent, leaving equities to be enforced in the usual manner, sect. 87. The intention of the Legislature is that deeds and other formal documents affecting the legal title in patents should appear on the register, and not every indefinite document like the present. Form L in the schedule to the rules supports this view. But if the Defendant is entitled to a third share of the patents, he has no right to retain the letters patent which were given him only for a particular purpose that has failed.

Sect. 85: "There shall not be entered in any register kept under this Act, or be receivable by the Comptroller, any notice of any trust expressed, implied, or constructive."

Sect. 87: "... The person for the time being entered in the Register of Patents, Designs, or Trade-marks, as proprietor of a patent, copyright in a design, or trade-mark, as the case may be, shall, subject to any rights appearing from such register to be vested in any other person, have power absolutely to assign, grant licenses as to, or otherwise deal with, the same and to give effectual receipts for any consideration for such assignment, license, or dealing. Provided that any equities in respect of such patent, design, or trade-mark may be enforced in like manner as in respect of any other personal property."

Sect. 90: "The Court may, on the application of any person aggrieved by the omission without sufficient cause of the name of any person from any register kept under this Act, or by any entry made without sufficient cause in any such register, make such order for making, expunging, or varying the entry, as the Court thinks fit; or the Court may refuse the application; and in either case may make such order with respect to the costs of the proceedings as the Court thinks fit."

Cutler, Q.C., and *Bissill*, for the Defendant:—

The letter is clear and consistent, and conferred an immediate interest on the Defendant. It is not a trust, and therefore it can be registered. A patent is a *chose in action* and there is no difference between a legal and equitable interest in it, and a deed is not necessary for transmitting any interest in it. The 3rd sub-section of sect. 23 points to documents other than deeds. This is a document "affecting the proprietorship" of the patent, and therefore capable of registration. As to the retention of the letters patent, the Defendant is a co-owner, and has expended considerable sums in relation to them.

Daniel, in reply.

Romer, J.:—

The first point I have to consider is, what is the effect of the document of the 29th of January, 1889, bearing in mind the prior correspondence and the surrounding facts which have been put in evidence before me? In my judgment, it was intended to confer by that document on the Defendant a one-third share in the patents as from its date. On the evidence there was clearly consideration enough to support the transaction, and it was not intended that the interest conferred on the Defendant should be in any way conditional. Indeed the document in itself is plain as shewing that it was intended to take effect from its very date. It appears to me, therefore, that in the broad sense of the term, it was an assignment of an interest in the patents, that interest being a one-third interest, and that the Defendant became entitled to that one-third interest as and from the date of the document.

That being so, the next question is, whether the Comptroller has rightly permitted an entry on the Register of Patents of the Defendant's interest under that document? I think the Comptroller was right. If it was, as I think in the broad sense of the term it was, "an assignment of an interest" in the patents, then it comes within the provisions of rule 65, and is a matter affecting the proprietorship of the patents, which it is prescribed by rule 65 shall be entered in the register—I am bound to say not

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in so many terms, but by necessary, or, at any rate, sufficient implication. But, in addition to that, even if it was not an assignment properly so called of an interest in a patent, then it appears to me it was a "document affecting the proprietorship" of the patents, and which, therefore, under rule 68, should be entered in the register according to the provisions of sect. 23 of the Act. I agree that rule 68 does not in absolute terms prescribe its entry, but it does, I think, by necessary, or, at any rate, sufficient implication. That being so, I think that the entry by the Comptroller was proper, and that the motion to expunge the entry fails, and must be refused with costs.

Then as to the action: that is practically disposed of by what I have already said; but I think both parties were to a certain extent wrong. The Plaintiffs were wrong in seeking to establish that the Defendant had no interest in the patents, and no right in respect of the documents which were in his possession, except as an agent for them, and the Defendant was wrong in retaining possession of the letters patent as against the Plaintiffs. It appears to me that the Defendant obtained possession of the documents of title, the letters patent, for the purpose of carrying out the sale which was referred to in the correspondence, and that when the sale fell through the Defendant, as the owner of one-third of the letters patent, could not properly retain them as against the Plaintiffs. But I need not further deal with the matter, because the Defendant has undertaken, notwithstanding his right to one-third of the letters patent, to hand over to the Plaintiffs, as owners of two-thirds of the letters patent, the two documents in question, and I need upon that undertaking make no other order in the action except that each party pay their own costs. There will be liberty to apply.

H. L. F.

C. A.

The Plaintiffs appealed from this decision. The appeal came on to be heard on the 18th of November, 1891.

E. M. Daniel, and *W. Mackenzie*, for the Appellants:—

An ambiguous and informal document like the letter of the 29th of January, 1889, ought not to be on the register as an assignment within sects. 23, 85, and 87 of the *Patents, &c., Act,*

1883. It is not an assignment; it cannot amount to more than an agreement to assign. There was no consideration for the agreement, and no immediate interest passed. It at most confers only an equitable title, which may be enforced by proceedings in Equity like any other equitable demand, but of which by the express provision of the Act no notice can be placed on the register. An assignment should be by deed.

[Bowen, L.J.:—Was it so under 15 & 16 Vict. c. 83, s. 35?]

The point has not been decided, though it has been held that a license need not be made by deed: *Chanter* v. *Dewhurst* (1). A mere licensee cannot sue alone: *Heap* v. *Hartley* (2). The old rule still applies to assignments. As there is no legal assignment, there ought to be no entry on the register.

[They also referred to rules 65 and 68 of the Patents Rules, 1883.]

Cutler, Q.C., and *Bissill*, for the Defendant, were not called on.

Lindley, L.J.:—

This is an appeal from an Order made by Mr. Justice *Romer*, and the question raised by the appeal is whether an entry on the Registor of Patents ought to be expunged. In order to determine that question, the first thing is to see what the entry is. We have sent for and looked at the book, and have seen what is registered. What is registered is this: There is on the file in the Patent Office a letter dated the 29th of January, 1889, written and signed by *Stewart* and *Charlton*, who are the registered proprietors of the two patents, addressed to Mr. *Casey*, at whose request this document was entered on the register. The letter runs thus: "Dear Sir,—*Stewart* and *Charlton's* Patents,—We now have pleasure in stating that in consideration of your services as the practical manager in working our patents as above, for transit by steamer or for any land purposes, we agree to give you one third share of the patents above mentioned, the same to take effect from this date. This is in addition to and in combination with our agreement of the

(1) 12 M. & W. 823. (2) 5 Rep. Pat. Cas. 603.

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29th November last." *Casey* has taken that document, as I say, to the Comptroller, with a request to have it registered, and that document has been registered. In addition to that there is in the book of proprietors an entry referring to this registered document, and stating in substance that *Casey* claims an interest in these patents under it. The application to us, therefore, is to expunge those two entries, and the question is whether Messrs. *Stewart* and *Charlton* are entitled to have them expunged. For that purpose we must have regard to the sections in the *Patent Act of* 1883 which relate to this matter, and see what can be properly registered, and what the expunging section says about removing from the register entries improperly made.

The important sections are 23, 85, 87, and 90. [His Lordship read sect. 23, and continued:—] Pausing there for a moment, and bearing in mind that before the Act of 1883 the right method of assigning a patent was by deed, and not finding in the present Act anything that alters the law in that respect, I suppose it must be taken that the proper mode of assigning a patent is by deed now; but bearing that in mind, it is quite obvious that something more than assignments by deed may be registered. The words of sect. 23, "affecting the validity or proprietorship of patents," point indisputably, taken in conjunction with the context, to something besides deeds, and something besides probates of wills and matters of that kind.

Then sect. 85 must be construed with sect. 23, and the two must be read as one, so as to work together. [His Lordship read sect. 85, and continued:—] Reading those two sections together, there are two methods of interpreting them. One is, to say that sect. 85 excludes and renders it improper to register any document of any sort or kind which upon the perusal of it gives notice of any trust. That is one method of reading it; and the other is to confine sect. 85 to that which it speaks of, "notice of any trust." If you put the first interpretation on sect. 85 you destroy sect. 23, or a great deal of it. You cannot put such a construction on sect. 85 as to exclude from registration all documents affecting the proprietorship of the patents which, when looked at, will shew that there is a trust. That cannot be the theory of it. If that had been so, sect. 23 would have been

very differently worded. In order to interpret the two sections together, you must draw a distinction between agreements and other documents which do affect the proprietorship and simple notices of trusts; and whereas, on the one hand, notice of a trust is not to be put on, documents which affect the proprietorship, whether by creating trusts or otherwise, are not to be excluded. That is how I understand these sections, and that interpretation will make them work, and make them work in practice, as I believe, in fact, they are worked. Then sect. 87 is this: [His Lordship read that section.] That section again throws light, I think, on the true construction of the two previous sections, 23 and 85, which shews that the interpretation I have suggested is the correct one.

Then sect. 90 is as follows:—[His Lordship read the section.] There is no question, I suppose, that Mr. *Daniel's* clients are persons who would be aggrieved and entitled to apply to have this entry expunged if this entry were not properly on the register itself.

Now, passing to the rules, which we must do in order to see how this is practically worked, we begin with rule 64, under the head of "Register of Patents." Rule 64 says, that "the Comptroller shall cause to be entered on the Register of Patents the name, address, and description of the patentee as the grantee thereof," so as to give a sort of root of title. Everything must come on the register. Then rule 65: "Where a person becomes entitled to a patent or to any share or interest therein, by assignment, either throughout the *United Kingdom* and the *Isle of Man*, or for any place or places therein, or by transmission or other operation of law"—that is, assignment, or transmission, or other operation of law—"a request for the entry of his name in the register as such complete or partial proprietor of the patent, or of such share or interest therein, as the case may be, shall be addressed to the Comptroller." Now, is "assignment" there to be read as assignment by deed? That, I think, would be putting far too narrow a construction on it, as I think will be apparent when we look at rule 68. Rule 68 says, and it must be taken in connection with rule 65: "Every assignment and every other document containing, giving effect to, or being evidence of, the transmission of a patent or affecting the proprietorship thereof

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as claimed by such request, except such documents as are matters of record, shall be produced to the Comptroller, together with the request." That indicates something far less formal than a legal assignment by deed. It is impossible, I think, to cut those words down so as to exclude agreements relating to, or, in the language of the rule, "affecting the proprietorship" of the patent. Then rule 69 is only, that "There shall also be left with the request an examined copy of the assignment or other document above required to be produced."

In pursuance of these enactments and rules, Mr. *Casey* did, as I have said, take this letter to the Comptroller and request him to register it. The Comptroller has done so, as I have mentioned; and the question is whether he has done wrong. It appears to me that there is nothing wrong, and that this is one of those documents which are intended to be registered under sect. 23, and which do not amount to an infringement of the prohibition against entry of notices of trusts under sect. 85. The effect of this document is unquestionably to give Mr. *Casey* an immediate equitable interest in these patents. I do not think any one can say that he is interested as legal proprietor, and I do not say he is so entitled. That is quite another matter; but that he has an immediate equitable interest in one-third of the patents is too plain for reasonable doubt. It is not simply an agreement to transfer the patents—that might be different—but it is an agreement "to give you one-third share of the patents above mentioned, the same to take effect from this date." Those are the important words which convert this into an immediate equitable assignment of the patent. Mr. *Casey* was quite right in having that registered. The only conceivable doubt was whether registering this document was an infringement of sect. 85, referring to notices of trusts, and I think it is not. Therefore, this appeal must be dismissed.

Bowen, L.J.:—

This is the first time that this particular point has come before the Court, and perhaps that may be an excuse for my adding a few words of my own to shew that we have all brought our minds

to bear on this question. I will begin by saying what it is exactly that we are deciding, and what the point of law is. What I understand our decision to be is this, that equitable assignments of a patent, or of a share in a patent, may be entered on the register, not indeed as legal assignments, but entered under sect. 23 of the Act, in combination with rule 65, as documents which affect the proprietorship of patents, and as such prescribed by rule 65 for entry.

Now, that being the point of what we decide, let us see how the case has reached that point. This is an application to expunge the entry on the register, not of the name of a person, but of a document which has been put on the register. This application, when first launched by Mr. *Daniel*, whose materials only became perfect in his hands during the progress of the case, was launched by him as a case in which he had a right to expunge the entry of the assignment of a patent. He said that this document is not the assignment of a patent under sect. 87, and ought, therefore, not to be put upon the register as such. If, indeed, this had been the case of the entry under sect. 87 of the assignment of a patent and the treatment under sect. 87 of Mr. *Cutler's* client as a person who had become entitled by assignment under that section, at the present moment it strikes me that Mr. *Daniel* would have been right. It is not necessary to decide the question; but, as I think we all entertain the same opinion, I do not see why I should not mention it, always reserving our right to decide, if the question really arises, differently. But it certainly does strike one that a patent which is created by deed can only be assigned by deed, and for that view one may refer shortly to the case in *Coke* (1), and the case, although it was a copyright case, of *Power* v. *Walker* (2). In illustration of that view, one may mention that licenses are by deed; and it does strike me as probable that now, as before the Act, legal proprietorship is that which is dealt with under sect. 87, and that the person who is the proprietor of the patent means the proprietor of the patent in law. Therefore, it would be wrong, it seems to me, to treat a writing not under deed as if it was an assign-

(1) *Lincoln College's Case*, 3 Rep. 63a. (2) 3 M. & S. 7.

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ment of a patent which would give a right to the person who claimed under it to consider himself as the legal proprietor. It may seem strange that in these days still there should be differences between transactions which are effected by seal and transactions which are not—for instance, between equitable rights and legal rights. But the theory of the law of registration, both about patents and many other things which could be mentioned, being based on the wish to simplify transactions, I think has gone constantly to this, that the legal estate is that which for the purpose of business it is desirable to keep to as regards the register, and I am not at all sure that that is not the true view of sect. 87 of the Act. But during the argument it transpired that nothing had been done of the sort which Mr. *Daniel* supposed. We sent for the register and examined it, and there is no change of the legal proprietorship effected on the register. Nothing at all has happened except an entry on the register by means of the filing of this document, which I will examine in a moment. Therefore, even if what has been effected would not be justified by sect. 87, it is not one of those transactions which are to be judged by sect. 87, but by some other section. What other section is there that justifies entries upon the register, even though they do not amount to the legal transfer of title? Sect. 23, which creates the register, and says that the names and addresses of grantees of patents, notifications of assignments, transmissions of patents and of licenses, are to be entered, "and such other matters affecting the validity or proprietorship of patents as may from time to time be prescribed." "Prescribed" in the section means, of course, prescribed by rule. We have, therefore, not merely to consider whether this is a legal assignment of the patents, but whether it is a matter that affects the proprietorship of the patents; and if we consider that it is a matter which affects the proprietorship of the patents, then the only real question remains, whether it is such a matter as is prescribed by rule, or comes within the rule.

Now, first, is it a matter affecting the proprietorship of the patents? For that purpose the document itself must be examined. The document is one by which the signatories agree with Mr. *Casey* to give him "one-third share of the patents

above mentioned, the same to take effect from this date." It cannot be denied that that is an equitable assignment if it is anything. It is not an agreement to take effect at some future date. It is an agreement to give him the share as from the date of the document, and it immediately passes in Equity the right to the third share.

But then it was said by Mr. *Daniel*, "But there is no consideration, and this document is not under seal." We will see if there is consideration. The consideration is stated, such as it is. It is, "in consideration of your services as the practical manager in working our patents as above for transit by steamer." Then says Mr. *Daniel*, "Yes, but that is a future consideration, and a future consideration, if nothing were done under it or nothing was proved to be done, would fail." The answer to that is that the consideration is not the rendering of the services, as is plain from the fact that the document is to take effect in Equity from the date. The consideration must be something other than rendering services in the future. It is the promise to render them which those words imply, that constitutes the consideration; and the promise to render future services, if an effectual promise, is certainly good consideration. Then, driven from that, Mr. *Daniel* said, "Oh! but it is past services that it means, and past services are not a consideration for anything." Well, that raises the old question—or might raise it, if there was not an answer to it—of *Lampleigh* v. *Braithwait* (1), a subject of great interest to every scientific lawyer, as to whether a past service will support a promise. I do not propose to discuss that question, or, perhaps, I should not have finished this week. I should have to examine the whole state of the law as to, and the history of the subject of, consideration, which, I need hardly say, I do not propose to do. But the answer to Mr. *Daniel's* point is clear. Even if it were true, as some scientific students of law believe, that a past service cannot support a future promise, you must look at the document and see if the promise cannot receive a proper effect in some other way. Now, the fact of a past service raises an implication that at the time it was rendered it was to be paid for, and, if it was a service which was to be paid

(1) 1 Sm. L. C. 8th Ed. p. 151.

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for, when you get in the subsequent document a promise to pay, that promise may be treated either as an admission which evidences or as a positive bargain which fixes the amount of that reasonable remuneration on the faith of which the service was originally rendered. So that here for past services there is ample justification for the promise to give the third share. Therefore, this is an equitable assignment which cannot be impeached.

If it is an equitable assignment, it is a document which affects the proprietorship of the patent. It does not alter the proprietorship, but it affects it because it gives a man a right in equity to have it altered at law. The only objection to that could be, if it was a valid one, the objection which might arise under sect. 85, which says that notices of trusts are not to be entered upon the register. If it could be made out that an equitable assignment was not to be entered on the register simply because it created a trust, and therefore carried with it the notice of the trust which was created—if sect. 85 was to be expanded or stretched to that enormous length, then Mr. *Daniel's* client might succeed. But what does sect. 85 mean? Trusts had been registered up to that time by the Patent Office; but this section intended that notices of trusts, as distinct from documents which created trusts in Equity, were not to be sent to the Comptroller and entered upon the register. Nobody has a right under this Act to affect the register with the burden of a notice of a trust. That is what I think this section means. Nobody who may have gone to the register and examined it shall be in peril of being affected with notice of a trust or any other interest except that which appears on the register. Again, by sect. 87, to go back for a moment in order to make this point clear, the assignment of the legal proprietorship of the patent is to take effect "subject to any rights appearing from such register to be vested in any other person." Sect. 85 then becomes important. The assignee takes subject to the rights which appear on the register to be vested in somebody else; but nobody is to clog the register by simply giving a notice of a trust, whether the trust is expressed, implied, or constructive. That does not prevent a document being entered which affects the proprietorship, nor can such document be expunged on the ground that, although it affects the pro-

prietorship, anybody who reads the document will see there is a trust created by it.

All that remains, therefore, to be considered is whether this entry is prescribed by the rules. There is a little difficulty about the rules, but the rules must have such working effect given to them as makes them intelligible and sensible. Rule 65 is the rule which we must consider in order to see whether this is an entry affecting the proprietorship which comes within it. In regard to that rule, it must be recollected that the Act of Parliament under sect. 23 intended that matters which affected the proprietorship, but which did not amount to a transfer of proprietorship, should be entered if the rules so prescribed; and when you come to the rule you see that a person has a right to request the entry, not merely of the assignment of the patent, but of the assignment of any interest in the patent. There, I think, the word "assignment" must receive a liberal interpretation, and not the confined one which has been given it under rule 65 when dealing with assignments of a patent. I think the word is large enough to cover equitable assignments of interests or equitable assignments of a patent, and that there is a right to have entered upon the register as a document affecting the proprietorship of a patent any equitable assignment either of a patent or of any share or interest in a patent. That seems to me the true view of this Act. Rule 68, which the Lord Justice *Lindley* called attention to, bears that out most completely, because it is not only that "every assignment," but every other document of title is to be produced to the Comptroller, and such other proof of title as he may require for his satisfaction. Therefore, I come back to say, that what we have decided is, that under this Act the equitable assignment of a patent, or of a share or interest in a patent, may be entered on the register under sect. 23 by virtue of the operation of rule 65, which is wide enough to include those documents though they do not fall under sect. 87 of the Act.

Fry, L.J.:—

The first question in this case is, what is the document of the 29th of January, 1889? Is it an agreement and nothing more.

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or does it amount to an equitable assignment? The distinction I take to be this: That an agreement which does not exhibit the intention of the parties that the property shall pass at once does not take effect as an equitable assignment at once, but only when, from the terms of the agreement, it can be gathered that the intention of the parties is that the equitable property shall pass. On the other hand, where the intention is that the property shall pass either at once or upon the satisfaction of some condition, then the equitable property does pass at once or upon satisfaction of that condition, as the case may be. Now here the document upon its very face expresses the intention that the property shall pass at once—that it shall come out of the grantors and be vested in the grantee on the very day of the writing of the instrument. The instrument, therefore, is, in my opinion, not merely an agreement, but it is an agreement which effects an equitable assignment of an equitable interest in the patent.

That being so, we have to apply ourselves to the statute, and I shall be very short in expressing my view of it. I think that this case is governed by the 23rd section of the statute of 1883, taken in conjunction with the 65th rule. I incline to think that the words "notifications of assignments" in the earlier part of sect. 23 apply only to legal assignments of patents; but then there are the words, "and such other matters affecting the validity or proprietorship of patents as may from time to time be prescribed." We know that the prescription is found in rule 65, and that says, that "Where a person becomes entitled to a patent or to any share or interest therein, by assignment." It appears to me that that clause does not extend to agreements which do not operate as an assignment of the equitable interest, but that it does extend to agreements which do make an equitable assignment of an interest. It is impossible, I think, according to the reasonable construction of these rules, to hold that interest must be a legal interest. "Any interest" must include equitable interests. They are the commonest kind of interest to create in property. They are as familiar to every lawyer as legal interests. The language, therefore, must include, in my view, equitable interests. Equitable interests pass by

equitable assignments, and that is exactly what this instrument is.

That it was the intention of the Legislature and the expectation of the Legislature that interests other than legal interests constituting proprietorship should appear is plain from the 87th section. That puts the power of conferring a title—a power of absolute assignment—in the hands of the person who for the time being is entered on the Register of Patents as proprietor But, subject to what? "Subject to any rights appearing from such register to be vested in any other person." The rights of proprietorship are purely legal rights; but any other rights—any right that may appear on the register—must, therefore, be, if not a legal right to proprietorship, either a legal right of some lesser description or an equitable right; and, therefore, it seems to me to be plain that the Legislature contemplated the prescription by the rules of a power to enter on the register rights which were not rights of proprietorship—including equitable rights.

The only other question is this. Is all that obvious intention of the Act excluded by the 85th section? I take exactly the same view of that section that has been expressed by my learned Brothers. I think it prevents *A.* from being put on the register with notice that he is a trustee for *B.*; but *B.'s* estate may, if *B.* goes through the proper formalities, makes his request, and produces his documents, be put on the register, not because *A.* is his trustee, but because *B.* has an equitable interest. So, in the present case, it is impossible to say that the fact that this equitable assignment may create a trust prevents it from creating an interest within the meaning of the word used in the rule, or a right within the meaning of the 87th section which would preclude its being put on the register. I think, therefore, that the 85th section must be read in the mode already suggested, and that the view taken in this case by the learned Judge in the Court below was perfectly accurate. The appeal must, therefore, be dismissed with costs.

Solicitor for Plaintiffs: *H. M. Smith.*
Solicitor for Defendant: *H. Nanson.*

M. W.

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[1884 L. 3267.]

Interest—3 & 4 Will. 4, c. 42, s. 28 [Revised Ed. Statutes, vol. vii., p. 415]—Money payable at a Time depending on a future contingent Event—Time depending on Verification of Accounts—Rate of Interest under the Statute.

Where the instrument under which a sum of money is payable makes the day of payment depend upon a future contingent event, such time is not a time certain within the 28th section of the 3 & 4 Will. 4, c. 42, and such sum does not carry interest unless there has been a demand for payment with notice that interest would be claimed.

The Plaintiffs and Defendants, who were competing railway companies, entered into a joint traffic agreement. The accounts of each company were to be exchanged and balanced every month, and 75 per cent. of the balance appearing on the accounts was to be paid on or before the 15th of the following month to the company to which it was due. The rest of the balance, if agreed on, was to be paid with the 75 per cent. in the next month; but if the balance-receiving company failed to verify the accounts for two months after the date of exchange, the payments on account were to cease till the verification was completed.

A dispute arose between the Plaintiffs and Defendants on the question whether the traffic on the Defendants' line between *L.* and *S.* ought to be brought into the joint account. The accounts, however, continued to be exchanged without including this traffic; but the Plaintiffs, who were the balance-receiving company, fell very much into arrear with the verification. The Plaintiffs brought an action claiming a declaration that the *L.* and *S.* traffic ought to be brought into the joint account. The Defendants resisted this claim, and also pleaded that the agreement was *ultrà vires* and altogether void. The Court decided that the agreement was valid, and that the Plaintiffs were entitled to have the *L.* and *S.* traffic brought into the joint account, and directed an account on that footing. It appeared from the evidence that the real reason why the Plaintiffs did not verify the accounts was, not the dispute between the companies, but the pressure of business in the Plaintiffs' office:—

Held (reversing the decision of *Kekewich*, J.), (1.) that the Plaintiffs were not entitled to interest on the balance either in the general account or in the account of the *L.* and *S.* traffic, as no time certain was fixed for payment in the agreement, nor any demand for payment or notice of claim for interest made within the 28th section of the 3 & 4 Will. 4, c. 42; and (2.) that the Plaintiffs having themselves made default in verifying the accounts, they could not claim interest on the ground that they had been

prevented by the Defendants from ascertaining the amount due, and from demanding payment and interest.

Merchant Shipping Company v. *Armitage* (1) followed.

Duncombe v. *Brighton Club and Norfolk Hotel Company* (2) not followed.

Semble, where interest is payable under the 3 & 4 Will. 4, c. 42, s. 28, the Court is not bound to give interest at the rate of 5 per cent., but will follow the current rate of interest at the time.

ON the 7th of September, 1865, an agreement was concluded between the Plaintiff and Defendant companies, which were competing railway companies, whereby the two companies agreed to bring their gross receipts from continental traffic, and local traffic and a certain proportion of their receipts from through traffic, into a common fund. The continental traffic was defined as traffic to and from *London viâ Dover* and *Folkestone*, to and from *Calais* and *Boulogne* and all other places on the Continent of *Europe*; local traffic was defined as traffic by rail from and to *London*, to and from *Folkestone* and *Dover*, and also the traffic by steamboat from and to *Dover* and *Folkestone* and all other places on the English coast, to and from *Calais* and *Boulogne* and all other places on the Continent; and through traffic was defined as traffic brought upon either of the railways from any railway beyond *London* or forwarded to any place beyond *London*. The common fund was to be divided between the companies according to a scale mentioned in the agreement and a joint committee was to be appointed by the two companies to manage the fund. In case the joint committee should be equally divided on any question, it was to be decided by Mr. *J. Smithells* as arbitrator.

It was further provided that each company should furnish monthly to the joint committee due and regular accounts of its receipts and deductions in respect of continental, local, and through traffic, and the accounting company should, if and when required by the joint committee, produce all necessary and proper vouchers and evidence of accuracy of such accounts, and forthwith duly pay over to the joint committee the balance appearing thereby to be payable.

The joint committee was duly appointed, but no common fund

(1) Law Rep. 9 Q. B. 99. (2) Law Rep. 10 Q. B. 371.

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was established; and disputes having arisen between the two companies, eventually all questions between them respecting the common fund were referred to Mr. *J. Smithells* as arbitrator. Mr. *Smithells* made his award on the 22nd of September, 1868, and thereby determined, among other things, "That for the future rendering, examining, and settling of the joint traffic agreement accounts between the two companies, they shall be made up monthly and completed within a reasonable time. For example:—

"1. The ordinary account for the month of February shall be rendered by each company to the other not later than the middle of the third month (May).

"2. The joint agreement account compiled from the ordinary account shall be exchanged between the companies by the end of the same month (May).

"3. A payment of not less than 75 per cent. shall be made on account of the balance appearing to be due on the face of the accounts so exchanged, and this payment shall be made as soon after the 1st of June as possible, and not later than the 15th of June.

"4. The balance of the previous month's account when agreed shall be brought forward and included in the next month's payment.

"5. The verification of the February accounts (exchanged at the end of May) shall be completed by the end of June, and, failing completion within two months from date of exchange by the balance-receiving company, the payments on account shall cease till such verification is completed."

Disputes again arose between the two companies about several matters, and, among others, whether the traffic between *London* and the stations of the *South Eastern Company* at *Shorncliffe* and *Cheriton Arch* (now called *Radnor Park*) ought to be brought into the common account as local traffic within the agreement. The Defendant company refused to bring this traffic into the account. The Plaintiff company, which was the balance-receiving company, fell into arrear with the verification of the accounts; but the accounts continued to be exchanged till after the commencement of the action, although the *Shorncliffe* and *Cheriton Arch* traffic was not included.

The present action was commenced on the 18th of December, 1884, to settle the disputed questions and take the accounts between the companies on the basis of the agreement and award, and in particular claiming that the *Shorncliffe* and *Cheriton Arch* traffic should be brought into the common fund.

The Defendants, in their statement of defence, resisted the claim respecting the *Shorncliffe* and *Cheriton Arch* traffic, and further submitted that the agreement of September, 1865, was *ultrà vires* and void.

In February, 1885, the Defendants ceased to bring in accounts for exchange; but the accounts were resumed in July, 1886.

On the 2nd of February, 1886, the Court held that the agreement of September, 1865, was valid; and on the 31st of July, 1886, this decision was affirmed by the Court of Appeal, and on the 14th of May, 1888, by the House of Lords.

On the 16th of November, 1887, Mr. Justice *Kekewich* gave judgment in the action, and thereby declared that the traffic on the Defendants' railway from or to *London*, to or from *Folkestone*, alighting or starting from *Shorncliffe Camp* and *Cheriton Arch*, was local traffic within the meaning of the agreement of September, 1865; and it was ordered that it be referred to the official referee to take an account as from the 1st of February, 1881, in accordance with the agreement made on the footing of the above declaration, of all sums payable by the Defendants to the Plaintiffs under the said agreement in accordance with the award of Mr. *Smithells*; but in taking such account no account already settled was to be disturbed.

The Defendants appealed from this judgment; but it was affirmed by the Court of Appeal on the 9th of November, 1888, and afterwards by the House of Lords.

The Official Referee made his report, dated the 18th of November, 1890, and thereby found that altogether £51,735 1*s.* 8*d.* was payable by the Defendants to the Plaintiffs at the date of the report. This sum included a sum of £22,171 16*s.* 4*d.* payable by the Defendants as interest at 5 per cent. on the balance due up to the 31st of December, 1887, and a further sum of £14,574 7*s.* 9*d.* payable by the Defendants as interest at the same rate on the capital account from the 31st of December,

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1887, to the date of the report. The Referee further said: "I have allowed such interest under and by virtue of the statute 3 & 4 Will. 4, c. 42."

During the progress of the action the verification of the exchanged accounts had been resumed, but did not make much progress. On the 8th of May, 1889, Mr. *Morgan*, the secretary of the Plaintiff company, wrote as follows: "You are probably aware that when the traffic accounts were suspended on the 5th of February, 1885, both companies were somewhat in arrear with the books, and that when it was renewed on the 29th of May, 1888, you would only allow us to commence with the account for September, 1884"; and Mr. *Morgan* asked to be allowed to complete the examination of the months not checked prior to September, 1884. On the 7th of June, 1889, Mr. *Morgan* wrote again, asking for access to all necessary documents from January to August, 1884, inclusive, and added: "As we were somewhat in arrear in the examination owing to the pressure of work in the office, several months have not been examined."

The action came on before Mr. Justice *Kekewich* on the 7th of April, 1891, for further consideration, and on motion to vary the Referee's report. The only point which requires a report is the claim of interest by the Plaintiff company.

W. Willis, Q.C., *Brice*, Q.C., and *C. T. Mitchell*, for the *South Eastern Railway Company*:—

Interest in this case is clearly not payable at the common law; *Higgins* v. *Sargent* (1); *Page* v. *Newman* (2), nor is it payable under the statute 3 & 4 Will. 4, c. 42, s. 28, which requires that there should be a debt or sum certain, and a certain time for payment, or, in the alternative, a demand for payment in the particular manner indicated by the statute: *Hill* v. *South Staffordshire Railway Company* (3); *Ward* v. *Eyre* (4). None of these requirements have been complied with in the present case. A balance due on account is not a sum certain. The statute in effect requires that the certainty of the time for payment shall appear on the face of the contract: see *Merchant Shipping Com-*

(1) 2 B. & C. 348.
(2) 9 B. & C. 378.
(3) Law Rep. 18 Eq. 154.
(4) 15 Ch. D. 130.

pany v. *Armitage* (1), which, as the decision of the Exchequer Chamber, is to be preferred to *Duncombe* v. *Brighton Club and Norfolk Hotel Company* (2); see also *In re State Fire Insurance Company* (3).

If interest is to be allowed at all, it ought to be at the rate of 4 and not of 5 per cent: *Wainwright's Case* (4); *Cook* v. *Fowler* (5).

Sir *H. Davey*, Q.C., *Haldane*, Q.C., and *Levett*, Q.C., for the *London, Chatham and Dover Railway Company*:—

Interest is payable under the statute: *Duncombe* v. *Brighton Club and Norfolk Hotel Company* is a clear authority that under the statute it is not necessary that the day for payment should be named in the written instrument; it is sufficient if a time or event be fixed the date of which can be ascertained afterwards. It is true that in that case *Blackburn*, J., dissented; but the terms of his dissent in truth lend force to the judgment of the majority of the Court, *Mellor* and *Lush*, JJ. The Referee has acted upon the principle, which it is submitted is right, that it must be assumed against the *South Eastern Railway Company* that but for the contention set up by them the accounts would have been exchanged: *M'Intosh* v. *Great Western Railway Company* (6). The principle on which Vice-Chancellor *Stuart* acted in that case (7) is untouched by the decision of Vice-Chancellor *Hall* in *Hill* v. *South Staffordshire Railway Company* (8).

Apart from the statute, interest may be payable on the ground that the money has been vexatiously withheld.

The interest ought to be at the ordinary mercantile rate of 5 per cent.

Willis, in reply.

1891. April 10. KEKEWICH, J. (after dealing with another part of the case, continued as follows):—

I pass now to the next important question, the question of interest. I take it that there is no interest chargeable on the sums

(1) Law Rep. 9 Q. B. 99, 114.
(2) Ibid. 10 Q. B. 371.
(3) 2 H. & M. 722.
(4) 62 L. T. (N.S.) 30.
(5) Law Rep. 7 H. L. 27, 34.
(6) 4 Giff. 683; 2 De G. & Sm. 758; 2 Mac. & G. 74.
(7) See 4 Giff. 683.
(8) Law Rep. 18 Eq. 154.

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due to the *London, Chatham and Dover Company*, under the agreement of 1865, at Common Law; and that unless they can get interest by force of the statute 3 & 4 Will. 4, c. 42, s. 28, they cannot get it at all. Sir *Horace Davey* said that he would argue that there was a claim to interest independently of the statute; but his argument, I think, was rather omitted than stated; at any rate, he did not urge it with much force, and I certainly did not appreciate the argument as shewing any title to interest independently of the statute. The agreement of 1865 provides only for payment to a common fund—a fund of course intended to be divided between the parties in certain proportions, but still I do not think it could be successfully argued that a contract to pay to a common fund, which was to be divided by subsequent agreement, could be a payment contracted to be made within the meaning of the statute, and therefore, if it stood there, I should have been in favour of the *South Eastern Railway Company* on the question of interest. But certain questions were referred to the arbitration of Mr. *James Smithells* in 1868. What those precise questions were it is immaterial to consider. They were all treated under this comprehensive head, "Payment to a Common Fund," and the parties have recognised Mr. *Smithells'* award under that particular head as dealing with the questions which were submitted to him, and it does not lie in the mouth of either of them, and neither of them has attempted, to say that Mr. *Smithells* exceeded his powers in making the award which he did. The award which he made swept away the common fund altogether; in fact, in determining what questions had arisen, whatever they were, respecting the common fund, he determined that there should be no common fund. He provided that there should be accounts rendered monthly; that from those accounts there should be compiled the joint agreement account; and that the joint agreement account was to be exchanged between the companies by the end of May, which he took as an example for the purpose of the monthly account for February in each year. It is common ground that that was only a month taken by way of example, and that by throwing forward the dates you may get the appropriate months throughout the twelve. Then he provided, "That a payment of not less than 75 per cent. shall be

made on account of the balance appearing to be due on the face of the accounts so exchanged, and this payment shall be made as soon after the 1st of June as possible, and not later than the 15th of June."

Now let me assume that the award was strictly observed and that the accounts were rendered and exchanged, we will say for February. The result would be that as soon as possible after the 1st of June, and not later than the 15th of June, in other words, for certain on the 15th of June, the receiving company, that is to say, the *Chatham Company*, were entitled to receive 75 per cent. of the balance appearing to be due to them on the face of the exchanged accounts. That is the effect of Mr. *Smithells'* award. It is said that that is not a provision sufficient to bring the case within the statute. To my mind, it is perfectly clear that there is a provision for payment of a certain sum, that is to say, a sum appearing on the face of the accounts exchanged, to be paid on a certain day, that is on the 15th of June, and the fact that it depends on accounts which are to be exchanged between the parties, cannot, according to any rule of which I am aware, make the slightest difference, provided the accounts are exchanged. An agreement to do that which *A. B.* determines is when *A. B.* has determined it as certain as an agreement to do the thing specifying it, instead of mentioning that it depends upon the determination of *A. B.*

On those grounds, I have no doubt that there is a provision for payment of a certain sum at a certain time.

I have expressed my own opinion; but the authority was cited, and it appears to me a conclusive authority, of *Duncombe* v. *Brighton Club and Norfolk Hotel Company* (1), and as I have already ventured to say during the argument, the judgment of Lord *Blackburn*, then Mr. Justice *Blackburn*, who differed from Justices *Mellor* and *Lush*, who sat with him, appears to me a conclusive argument in favour of the view which he did not take. He admitted that his view was a narrow one, that the view of his brother Judges was a broad one, and he admitted their view was the one which ought in justice to prevail. I cannot help thinking that no more powerful argument could have been

(1) Law Rep. 10 Q. B. 371.

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suggested in favour of their view than the judgment of the differing Judge. But it is said, and said with truth, that the accounts were not exchanged, and I must deal with that question. Why were the accounts not exchanged? They were not exchanged because the *South Eastern* doubted and disputed the agreement under which the award was made, and under which, therefore, the accounts had to be exchanged. I see no answer to Sir *Horace Davey's* argument, that pending that dispute it was impossible for them consistently to render accounts, or for the *London, Chatham and Dover Company* to ask them to render them, and it was useless and idle for the *London, Chatham and Dover Company* to offer to render their own when they knew that none would be given in exchange. I think that that is an answer, and that it gets rid of the objection, that, in fact, no accounts were exchanged. On that point the decision of Vice-Chancellor *Stuart* in *M'Intosh* v. *Great Western Railway Company* (1) is of great value, and especially the latter part of his judgment on page 698, the passage which Sir *Horace Davey* read, and which I will not read again. It is said that Vice-Chancellor *Hall* in *Hill* v. *South Staffordshire Railway Company* (2) doubted that authority. I do not read him as having done so as regards the case now before me. If one looks into that case before Vice-Chancellor *Hall*, it will be seen that he was treating the case before Vice-Chancellor *Stuart* independently of the statute, whereas it is quoted to me under the statute, and that deprives the criticism of Vice-Chancellor *Hall* of any value for the purposes of this case, whatever value that criticism may have when considered in reference to any other case where the question arises independently of the statute. I think the *South Eastern Company* cannot sustain an argument that they are not to be liable to interest because accounts were not exchanged when their disputes were the reason for the accounts not being exchanged.

Here it is said further that the verification of the accounts ceased, and that therefore no interest can be payable because the 5th clause of the award provides that so long as there is no verification there shall be no payment. That clause imposes a penalty on the balance-receiving company. They are not to

(1) 4 Giff. 683. (2) Law Rep. 18 Eq. 154.

receive any payment so long as there is no verification. If the fault lay upon them they are not to be paid. I have heard nothing to shew that the fault lay at any time upon the *London, Chatham and Dover Railway Company* It may be that their work was behind. It seems to me that it was; but their work was behind because the work of the other company was not ready. I certainly am not prepared to consider that clause as meaning that though the balance-receiving company may be in no way in default, may be, indeed, eager and anxious to complete the work, yet they are not to be entitled to any payment under the 3rd clause in respect of the 75 per cent. because their debtors are behindhand. I think, therefore, that the Official Referee's calculation of interest on all these sums must stand.

Then it is suggested that it ought to be reduced from 5 to 4 per cent. I have already stated my opinion that this is a question which deserves full consideration; but I do not think it would be wise or right for me now fully to consider it. In looking at the case of *M'Intosh* v. *Great Western Railway Company* (1) I find that the Vice-Chancellor *Stuart* dealt with the very same point very much in the same way in which I am prepared to deal with it here. He says he cannot say that 4 per cent. was wrong, though possibly he might have given 5 per cent. himself. I am by no means unwilling that my decision on this point should be reviewed. I do not mean that I am unwilling on any point that my decision should be reviewed, but I think this point deserves much more consideration than it has hitherto received, and I therefore wish to express what I mean as plainly as I can. What I understand to be the practice is for juries invariably to give 5 per cent. When I say invariably, I mean so generally that the exceptions are few and far between. And more than that, I believe that it has always been, since the statute, the habit of Judges directing juries to tell them that they may give 5 per cent.—that what is called in the statute the current rate of interest may be, if it is not, 5 per cent., and that that view has prevailed until now as a rule, notwithstanding that it is extremely difficult for prudent persons to get so much as 3 or 4 per cent. on investments, and

(1) 4 Giff. 683, 698.

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notwithstanding that persons engaged in trade do not gain those large returns which were formerly possible and frequent. I see in one case at least which has been cited to me, *Wainwright's Case* (1), Mr. Justice *Kay* gave 4 per cent. on these grounds not long ago. In my own experience I have known cases of a like character. But it is obviously, to my mind, of extreme importance that there should be an ordinary rule, not settled by rule in the practice books, reduced to form, but a general habit which should guide the Courts, and which should guide Judges in directing juries. I think it would be an error on my part, in a case like this, where the Official Referee has indicated his concurrence from his experience, in the general rule to vary his report and change 5 to 4. If it is to be done I think it must be done with some consensus of opinion, and the alteration must emanate from a higher authority than myself. Therefore, as regards these items, the interest will stand, and at the rate mentioned by the Official Referee.

C. C. M. D.

The Defendants appealed from this judgment; and with regard to the interest they asked that both sums might be omitted, or in the alternative that the interest might be reduced from 5 to 4 per cent.

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The appeal came on for argument on the 28th of October, 1891. Several questions in dispute were argued on the appeal, and particularly whether a sum of £30,065, found by the Referee to be due to the Plaintiff company in respect of the "wrong route" traffic, was improperly included in the account taken under the decree. After the Court had given judgment on these points, the question of interest was argued.

Sir *E. Clarke*, S.-G., *W. Willis*, Q.C., *Brice*, Q.C., and *C. T. Mitchell*, for the Appellants, the *South Eastern Railway Company*:—

The next point is a very important one. It is as to the two items of interest charged, viz., £22,171 16*s.* 4*d.* and £14,574 7*s.* 9*d.* The latter is the interest since December, 1887, upon the

(1) 62 L. T. (N.S.) 30.

balance ascertained by bringing the £30,065 into account. The £22,171 16*s.* 4*d.* is made up of interest on the general balance from the 1st of July, 1885, to the 31st of December, 1887; interest on the joint traffic balances from the 1st of July, 1885, to the 31st of December, 1887, and interest on the *Shorncliffe* traffic and the surcharge on the *Shorncliffe* and *Folkestone* Exhibition traffic from the 1st of July, 1881, to the 31st of December, 1887. The general balance includes this £30,065, and must be rectified as a matter of calculation; and our contentions are—(1.) that no interest at all is payable; (2.) that if any interest is payable it should be at 4 and not at 5 per cent.; and (3.) that the *Shorncliffe* interest, if payable at all, ought not to begin to run until the 8th of July, 1885. The last account exchanged at the time when this action was brought in December, 1884, was the account for September, 1884. The 1st of July, 1885, was fixed as the date from which interest was to run on the joint traffic balances because the Official Referee considered that, whereas up to that date both parties had been in default in the exchange of accounts, from that date there ceased to be mutual default, and there had been default on the part of the *South Eastern* only, and that this had prevented the verification. But even if the accounts had been duly exchanged pursuant to *Smithells'* award no sum would be payable and no interest could run; and, further, supposing the Plaintiffs had verified the accounts they could not have claimed interest at Common Law, but only, if at all, under the statute 3 & 4 Will. 4, c. 42. Now, we maintain that all these sums which go to make up the £22,171 16*s.* 4*d.* stand on the same footing, and that the whole of that item must be struck out. There was no "debt or sum certain payable at a certain time" by one company to the other so as to bring the case within sect. 28 of the Act 3 & 4 Will. 4, c. 42. Looking back at the agreement, there was no sum at all payable under it, and the award neither fixes a certain sum nor the date of payment. The award merely provides that "payment of not less than 75 per cent. shall be made on account of the balance appearing to be due on the face of the accounts exchanged." There is no concluded and ascertained liability at all, only a payment "on account;" no time is fixed for the

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payment of the balance when agreed, and if the balances were never arrived at we were entitled to stop our payment of 75 per cent. Anything which makes the date uncertain takes the case out of the statute: *Merchant Shipping Company* v. *Armitage* (1); *Hill* v. *South Staffordshire Railway Company* (2). In *Duncombe* v. *Brighton Club and Norfolk Hotel Company* (3) the judgments of *Mellor* and *Lush*, JJ., are against us; but in that case Lord *Blackburn* felt compelled to dissent from the other Judges; the decision in *Merchant Shipping Company* v. *Armitage* was not brought to the attention of the Court, and the case is not on all fours with the present.

[BOWEN, L.J.:—*Talbot's* Index to Cases shews that neither the *Merchant Shipping Company* v. *Armitage* nor *Duncombe* v. *Brighton Club and Norfolk Hotel Company* have ever been quoted in any judgment; so the point arises after an interval of sixteen years.]

That is so. There is, moreover, no course of dealing between the parties from which it may be said that interest is payable. Interest was not claimed in this action, and the decree contained no directions to the Official Referee to give any interest whatever; but we do not argue the question of his jurisdiction in the matter of interest, for we are content, in order to avoid two arguments, to treat the matter as if the Court were dealing with it on further consideration.

The argument of the Plaintiffs is that this case falls within the first part of sect. 28, *i.e.*, that which deals with "debts or sums certain . . . . payable by virtue of some written instrument at a certain time." Now that "written instrument" must be an instrument in the nature of an agreement between the parties, and the only written agreement between the parties and that which fixes the relations between them is the agreement of 1865, which is not an agreement for payment by the one to the other. Under it, therefore, there can be no claim for interest. This is not like the ordinary case of a submission by two parties to an arbitrator to say how much is payable by one to the other at a certain time, where the award and submission can be coupled

(1) Law Rep. 9 Q. B. 99, 114. (2) Law Rep. 18 Eq. 154.
(3) Law Rep. 10 Q. B. 371.

together, and a contract to pay is constituted. Here you cannot read *Smithells'* award into the contract of 1865 so as to bring the case within sect. 28; and, taking for the purpose of the argument the award as part of the agreement, interest cannot be given: *Merchant Shipping Company* v. *Armitage* (1); *Hill* v. *South Staffordshire Railway Company* (2).

[BOWEN, L.J.:—Assuming that you are right under the statute, there is the broader question, whether or not in some shape or other interest is not due and could be recovered if the jury gave it.]

The right of the jury to allow interest is carefully limited by the statute; and, assuming that the Defendants by their own default have prevented the operation of the statute, then, first, this action is not brought upon that footing, and secondly, the other company might have brought themselves within the statute by making the demand and giving the notice required by the 28th section, which they did not do.

Upon the other point, as to the amount of the interest. Five per cent. is far beyond the current rate of interest in these days. The Bank rate is very seldom 5 per cent., and often much below 4 per cent.

[KAY, L.J.:—In *M'Intosh* v. *Great Western Railway Company* (3), which was a mercantile case, 4 per cent. was allowed.

LINDLEY, L.J.:—There is no rule at law that it shall be either 4 or 5 per cent.]

No; but we contend that there is a rule in Equity that it shall be 4 per cent.

[KAY, L.J.:—As against trustees, it has always been 4 per cent., and not more unless there has been some gross act.]

In *In re Bahia and San Francisco Railway Company* (4), which was decided in 1868, the Court of Queen's Bench, after holding the company liable to pay the claimants the value of certain shares at a given date, allowed interest at the rate of 4 per cent. from that date. In *In re Kerr's Policy* (5) which was decided in

(1) Law Rep. 9 Q. B. 99, 114.
(2) Ibid. 18 Eq. 154.
(3) 4 Giff. 683; 2 De G. & Sm. 758; 2 Mac. & G. 74.
(4) Law Rep. 3 Q. B. 599.
(5) Law Rep. 8 Eq. 331.

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1869, *James*, V.C., held a mortgagee, who had made no stipulation as to interest, entitled to interest at 4 per cent. only. In *Cook* v. *Fowler* (1) Lord *Hatherley* said (2), that treating the case as a claim for damages in default of payment, "it would only come within the ordinary rule of the Court of Chancery, which is to allow interest at the rate of 4 per cent." And in *Wainwright's Case* (3), heard in 1889, Lord Justice *Kay*, after stating that it was clearly a case for interest, said: "I do not, however, agree that I am bound by a hard and fast rule as to the rate of interest. Interest at 5 per cent. has been allowed because that was considered to be the mercantile rate of interest. But it is very hard to say now that that is the mercantile rate of interest, when from real *bonâ fide* good security you cannot get more than 3 per cent. I think, therefore, 4 per cent. is quite sufficient, and I allow interest at that rate."

Again, at the time we refused to exchange accounts there were unsettled accounts and matters in dispute which made it impossible to ascertain the balance if we had exchanged them; and this is a case in which there has been such delay on the part of our opponents that no jury, in the exercise of their discretion, would allow them any interest at all. This in not an action of debt. It is an action on a covenant, in which the Plaintiffs have not asked either for damages or interest. Damages for detention of money cannot be claimed at Common Law, and cannot be claimed in this action. There is, in fact, no cause of action at all. If we had exchanged accounts they could not have got interest under the statute, and, accordingly, the refusal to exchange accounts cannot entitle them to interest as damages. Before the statute it was established as a general principle that "interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances:" *Abbott*, C.J., in *Higgins* v. *Sargent* (4).

[BOWEN, L.J.:—The distinction between that case and the present is, that after the statute the breach of an agreement to

(1) Law Rep. 7 H. L. 27.
(2) Ibid. 37.
(3) 62 L. T. (N.S.) 30, 33.
(4) 2 B. & C. 348, 349.

exchange accounts has an additional element, that it prevents the person aggrieved from obtaining the benefit of the statute to get interest which he could not have obtained before.]

There has been no claim here for the breach at any time. [They also referred to *Page* v. *Newman* (1).]

Sir *H. Davey*, Q.C., *Haldane*, Q.C., and *Levett*, Q.C., for the Plaintiffs, the *London, Chatham, and Dover Railway Company*:—

It is too late now to say that there is no cause of action. We are entitled to interest by way of damages for breach of the agreement between the companies. The Defendants refused to bring into the common fund the traffic to *Shorncliffe* and *Cheriton Arch* stations. They were bound to do certain acts, not merely to make certain payments, and from their refusal to do them the Plaintiffs have sustained damage. Moreover, by their statement of defence, they repudiated the whole agreement, contending that it was *ultrà vires*.

[BOWEN, L.J., referred to *De Bernales* v. *Fuller* (2).

KAY, L.J., referred to *Farquhar* v. *Farley* (3), and *Webster* v. *British Empire Mutual Life Assurance Company* (4).]

The Plaintiffs gave frequent notices to the Defendants that unless the payments were more punctually made, they should claim interest, and also complained that their accountant was not allowed to proceed with the examination of the accounts. We also contend that interest is payable under the statute. There were both a certain sum and a certain date. Specific times were fixed by the arbitrator for paying the 75 per cent., and the amount payable as certain, for it was only a matter of arithmetical calculation. With regard to the 25 per cent. it could, it is true, only be ascertained after verification of the accounts; but that verification is nothing more than vouching the accounts, and it was to be completed in each year before the date fixed by the arbitrator. We are only claiming interest on balances, which ought to have been verified during the pending of the action.

(1) 9 B. & C. 378.
(2) 2 Camp. 426.
(3) 7 Taunt. 592.
(4) 15 Ch. D. 169.

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Merchant Shipping Company v. *Armitage* (1) is distinguishable. In that case the day of payment never arrived and never could arrive, from no default of either party; the judgment is very shortly reported and the grounds of decision not given. *Duncombe* v. *Brighton Club and Norfolk Hotel Company* (2) is in our favour.

[LINDLEY, L.J.:—That case seems to me irreconcilable with *Merchant Shipping Company* v. *Armitage*. If so, must not the last-mentioned case prevail, because it was decided by the Exchequer Chamber?]

It is contended that there is no certain sum because the amounts have never been verified; but that was the fault of the Defendants. They cannot complain that there was no verification, for the contention raised by them as to the traffic to the *Shorncliffe* and *Cheriton Arch* stations, prevented the accounts being verified. The principle is laid down in *M'Intosh* v. *Great Western Railway Company* (3). Vice-Chancellor *Hall*, in *Hill* v. *South Staffordshire Railway Company* (4), did not rightly appreciate the principle on which Vice-Chancellor *Stuart* acted in that case: namely, that where by a contract a sum of money is payable at a time certain, and the amount is to be ascertained on certain data, but a dispute arises as to the amount which is settled by the Court, interest is payable under the statute. As to the interest charged on the traffic to *Shorncliffe* and *Cheriton* stations, which ought to have been included in the Defendants' accounts, the Referee was right in giving it. It is, in fact, a stronger case than the receipts from the rest of the traffic. The rate of interest given by the Referee and Mr. Justice *Kekewich*, namely, 5 per cent. is not too high. The Defendants have kept the money and used it for the purpose of their trade, and, therefore, 5 per cent. is not unreasonable. It is the usual commercial rate: *In re Roberts* (5); *Cook* v. *Fowler* (6).

[LINDLEY, L.J.:—The rate of interest has changed. It is difficult to get 5 per cent. now.

(1) Law Rep. 9 Q. B. 99.
(2) Ibid. 10 Q. B. 371.
(3) 4 Giff. 683; 2 De G. & Sm. 758; 2 Mac. & G. 74.
(4) Law Rep. 18 Eq. 154.
(5) 14 Ch. D. 49.
(6) Law Rep. 7 H. L. 27.

KAY, L.J.:—This Court has usually given that rate in mercantile cases, because it was the current rate of interest. You cannot say it is so now.

BOWEN, L.J.:—If the *London, Chatham and Dover Company* wanted money, they could get it for 3 or 3½ per cent. Why should they exact 5 per cent. as a sort of vindictive punishment?]

The Official Referee was sitting as a jury, and was competent to estimate the damage as between two companies.

Willis, in reply:—

With respect to the claim for interest by way of damages, there has been no breach of the agreement. A repudiation of the contract only constitutes a breach on the election of the other party. But here the parties did not elect to accept the repudiation, but insisted on the completion of the contract; they cannot therefore now claim damages on the ground that the contract is at an end: *Frost* v. *Knight* (1); *Hochster* v. *De la Tour* (2); *Danube and Black Sea Railway Company* v. *Xenos* (3). The refusal to bring in the *Shorncliffe* traffic was no breach of the agreement. It was only a matter for reference. There was no breach at all before action brought.

[KAY, L.J.:—Was there not a breach by refusal to exchange accounts?]

The Defendants ceased to exchange the accounts because the Plaintiffs were so much in arrear in verifying them. They put no obstacle in the way of the Plaintiffs in verifying them. The letter of Mr. *Morgan* of the 7th of June, 1889, shews that the real reason for the delay in verifying the accounts was not the dispute between the companies but the pressure of work in the Plaintiffs' office. In order to bring the case within the statute there must be a time certain as well as a sum certain. Here no debt arose till the accounts were exchanged and several other things done. There could be no debt till the actual sum due was ascertained: *Foster* v. *Weston* (4).

(1) Law Rep. 7 Ex. 111.
(2) 2 E. & B. 678.
(3) 13 C. B. (N.S.) 825.
(4) 6 Bing. 709.

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The appeal in this case has been disposed of with the exception of two points, and the most important of those, and, in fact the most important point raised by the whole appeal, is that which we have taken time to consider, namely, the right of the Plaintiffs, the *London, Chatham and Dover Railway Company*, to claim interest upon the sums found due to them from the *South Eastern Railway Company*. The amount of interest claimed and due, if interest is payable, is very considerable, and the case becomes of importance to the parties in consequence of the amount; and it also is important to the public generally in consequence of the state of the law which relates to the payment of interest.

Now, in order to understand the matter, it will be necessary to refer shortly to the judgment for an account, which is the root of the Plaintiffs' present title to be paid anything, and then to refer shortly to the two documents referred to in that judgment. The object of this action—I do not say the whole of it, but the main object—unquestionably was to have it declared that the traffic referred to in the pleadings as "the *Shorncliffe* traffic" ought to be brought into account between the parties. That was the point in controversy between them. It was litigated up to the House of Lords, and it was decided in favour of the Plaintiffs.

The Court of first instance declared, and that judgment has been affirmed, "That the traffic on the railway of the Defendants"—that is the *South Eastern Railway*—"from and to *London*, to or from *Folkestone* alighting at or starting from the stations of the Defendants, respectively, formerly known as *Shorncliffe Camp* and *Cheriton Arch*, and now known as *Shorncliffe* and *Radnor Park*, as well as those known as *Folkestone* and *Folkestone Harbour*, is local traffic within the meaning of the agreement of the 7th of September, 1865." That, therefore, is settled in the Plaintiffs' favour, and nothing more turns upon that for the moment. "And this Court doth order that it be referred to the official referee in rotation to take the following account"—and this is important—"An account as from the 1st of February, 1881, in accordance with the agreement dated the 7th of September, 1865,

and, on the footing of the above declaration of all sums payable by the Defendants to the Plaintiffs under the agreement in accordance with the award of Mr. *James Smithells* in the pleadings mentioned. But in taking such account no account already settled is to be disturbed." That is an ordinary decree for an account. The documents referred to in that, are the agreement as to the division of continental and other traffic entered into between the two companies dated the 7th of September, 1865, and which may be shortly described as an agreement for pooling their receipts, and the award of Mr. *Smithells*. There was a clause that any dispute that arose should be referred to Mr. *Smithells*, and disputes have arisen. Mr. *Smithells* made what is called an award, dated the 22nd of September, 1868, and which is important with reference to the question of interest. He awards, "That for the future rendering, examining, and settling of the joint traffic agreement accounts between the two companies they shall be made up monthly, and completed within a reasonable period and as early as possible, for example: (1st.) The ordinary accounts, for the month of February shall be rendered by each company to the other not later than the middle of the third month, May. (2nd.) The joint agreement account compiled from the ordinary account shall be exchanged between the companies by the end of the same month, May. (3rd.) A payment of not less than 75 per cent. shall be made on account of the balance appearing to be due on the face of the accounts so exchanged, and this payment shall be made as soon after the 1st of June as possible, and not later than the 15th of June. (4th.) The balance of the previous month's account, when agreed, shall be brought forward and included in the next month's payment. (5th.) The verification of the February accounts (exchanged at the end of May), shall be completed by the end of June, and failing completion within two months from date of exchange by the balance-receiving company, the payments on account shall cease until such verification is completed." That 5th clause introduces a very important qualification upon the third—the payment of the 75 per cent. on account.

Now those being the documents, what we have to consider is this question of interest.

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Before the *Judicature Acts* a suit for an account could be maintained in equity in the following cases:—(1.) Where the plaintiff had a legal right to have money payable to him ascertained and paid, but which right, owing to defective legal machinery, he could not practically enforce at law. Suits for an account between principal and agent, and between partners, are familiar instances of this class of case. (2.) Where the plaintiff would have had a legal right to have money ascertained and paid to him by the defendant, if the defendant had not wrongfully prevented such right from accruing to the plaintiff. In such a case a Court of law could only give unliquidated damages for the defendant's wrongful act; and there was often no machinery for satisfactorily ascertaining what would have been due and payable if the defendant had acted properly. In such a case, however, a Court of Equity decreed an account, ascertained what would have been payable if the defendant had acted as he ought to have done and ordered him to pay the amount: *M'Intosh* v. *Great Western Railway Company* (1), is the leading authority in this class of case. (3.) Where the plaintiff had no legal but only equitable rights against the defendant, and where an account was necessary to give effect to those equitable rights. Ordinary suits by *cestuis que trust* against their trustees and suits for equitable waste fell within this class. (4.) Combination of the above cases. As regards interest it was settled by *Higgins* v. *Sargent* (2); *Page* v. *Newman* (3), and *Foster* v. *Weston* (4), that at common law interest was not payable on ordinary debts, unless by agreement or by mercantile usage; nor could damages be given for non-payment of such debts. The law in this respect was altered by 3 & 4 Will. 4, c. 42. That Act was passed in the year 1833, at a time when Mr. *Bentham's* attack on the Usury Laws had produced its effect upon the Legislature. The 28th section is as follows: "That upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not ex-

(1) 4 Giff. 683; 2 De G. & Sm. 758; 2 Mac. & G. 74.
(2) 2 B. & C. 348.
(3) 9 B. & C. 378.
(4) 6 Bing. 709.

ceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law."

Now, upon that enactment there were two authorities cited of some importance, namely, the case of *Duncombe* v. *Brighton Club and Norfolk Hotel Company* (1), and the case of the *Merchant Shipping Company* v. *Armitage* (2). This last case was decided by the Court of Exchequer Chamber, and appears to me to be inconsistent with *Duncombe's Case*—so inconsistent with it, that I do not see how it is possible for the two to stand together; *Duncombe's Case* was decided after the *Merchant Shipping Company* v. *Armitage*, but apparently before that case was so reported as to be brought to the notice of the Court. Mr. Justice *Blackburn* evidently, from his judgment, had some recollection of such a case having been decided. Now, *Armitage's Case* is extremely important. It was a case upon a charterparty. The marginal note is this: "By charterparty a ship was to load at *Colombo*, or *Cochin*, from the charterer's agents, a full and complete lading, and proceed to *London*, and discharge there, fire and other dangers of the sea excepted, a lump sum freight of £5000, to be paid after entire discharge and right delivery of the cargo, in cash, two months after the date of the ship's report inwards at the Custom House. Part of cargo loaded in accordance with the charterparty was lost by fire, without any default of the master or crew, and the remainder was delivered in *London*." There were two points raised, first, whether the shipowner was entitled to be paid the £5000—that has nothing to do with the question now before the Court. The Court said he was. Then came the question of interest, upon which there is this judgment at page 114, but of which, unfortunately, no notice is taken in the head-note of the case. Lord *Coleridge* says: "We are of

(1) Law Rep. 10 Q. B. 371. (2) Law Rep. 9 Q. B. 99.

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opinion that the plaintiffs are not entitled to judgment for the interest. We do not think that the principal sum is payable at a time certain. The judgment of the Court below will be affirmed as to the principal sum, but reversed so far as it relates to the interest." One cannot help seeing there that this was a restricted, or perhaps it may be called rather a narrow construction of this Act of Parliament. It follows the wording of the Act, and was less extensive than the case of *Duncombe* v. *Brighton Club and Norfolk Hotel Company* (1), which was subsequent to it, but which is inconsistent with it. I consider we are bound by the case in the Exchequer Chamber, and must take that as our guide.

Except as altered by the Act, the 3 & 4 Will. 4, c. 42, the old law as to interest remains. But, notwithstanding this rule against interest, if a person agreed to do something other than pay money, and he broke his agreement, an action for damages would lie against him, and, in estimating those damages and as part of them, interest might be reckoned on money which would have become payable by him with interest, if he had not broken his agreement, and thereby prevented the principal falling due. Some cases illustrating that proposition will be found in the note to *De Bernales* v. *Fuller* (2). The Court of Chancery followed the law in dealing with legal claims. That will be found established, after some fluctuation of opinion, in the case of *Booth* v. *Leycester* (3), where Lord *Cottenham* went into the matter. But it usually decreed interest in cases of purely equitable demands—for instance, in suits against trustees who misapply trust moneys, and in suits for equitable waste.

In cases falling within the second class to which I have alluded, whether interest would be given depended upon whether the money, if it had become payable at law, would at law have borne interest. Interest was given by Vice-Chancellor *Stuart* in *M'Intosh* v. *Great Western Railway Company* (4) because he thought that it would have been payable at law under 3 & 4 Will. 4, c. 42, if the defendant had not rendered it impossible for the plaintiff to sue him at law. In *Hill* v. *South Staffordshire Railway Com-*

(1) Law Rep. 10 Q. B. 371.
(2) 2 Camp. 426.
(3) 3 My. & Cr. 459; 1 Keen, 247.
(4) 4 Giff. 683; 2 De G. & Sm. 758; 2 Mac. & G. 74.

pany (1) Vice-Chancellor *Hall* was of opinion that Vice-Chancellor *Stuart* had made a mistake in thinking that in *M'Intosh's Case* (2) interest would have been payable at law if the defendant had acted properly, and in the case before him Vice-Chancellor *Hall* gave no interest to the plaintiff. But the principle acted upon by Vice-Chancellor *Stuart* in *M'Intosh's Case* was correct, and I do not understand Vice-Chancellor *Hall* to have differed from him upon this point.

The principle is, that a person is not allowed to derive any advantage from his own wrongdoing, and that, in order to prevent this, a Court of Equity will treat him as having done that which he ought to have done. In such a case as is now being considered the first thing to ascertain is what would have been payable under the agreement if the Defendants had not wrongfully prevented anything from becoming due. The sum thus ascertained will be treated as a debt in equity, although it is not a debt at law. The next thing to ascertain is whether the sum so found to be payable would have carried interest if it had become payable under the agreement. If the answer to this last inquiry is No, then no interest can be given. That is settled by *Booth* v. *Leycester* (3), which I have already cited. But if the answer is that the sum, if ascertained, would have carried interest, then interest ought to be ordered to be paid on that sum, just as interest would by hypothesis have been payable on what would have been a legal debt if the Defendant had not prevented its creation. This mode of dealing with such cases results from the simple application of ordinary principles of equity; it does not depend on Lord *Cairns'* Act, nor on any jurisdiction of the Court of Chancery to give damages. The Court simply computes interest on what it treats as an equitable debt bearing interest, but in ascertaining what is due the Court does not stop at the date of the commencement of the action, but brings the account down to the moment when the Chief Clerk makes his certificate, and interest does not stop even then.

Having made these preliminary observations, I proceed to

(1) Law Rep. 18 Eq. 154.
(2) 4 Giff. 683; 2 De G. & Sm. 247.
(3) 3 My. & Cr. 459; 1 Keen, 758; 2 Mac. & G. 74.

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inquire whether, if the Defendants had duly exchanged accounts pursuant to *Smithells'* award, interest could have been claimed by the Plaintiffs on the sums appearing to be due to them on such accounts. The answer to this question is clear from the terms of *Smithells'* award; no sum would become payable, and, therefore, no interest would run, if the Plaintiffs themselves made default in verifying the accounts so exchanged. Even if the Plaintiffs had verified the exchanged accounts, interest would not have been payable at common law; it could only have been claimed under the statute 3 & 4 Will. 4, c. 42, and, unless the verification were followed by such a demand for payment and notice that interest would be claimed as that statute requires, interest would not have been payable. This is the only conclusion which is consistent with the decision of the Exchequer Chamber in the *Merchant Shipping Company* v. *Armitage* (1). This case, as I have said, cannot be reconciled with *Duncombe* v. *Brighton Club and Norfolk Hotel Company* (2), but the latter decision was evidently pronounced by Justices *Mellor* and *Lush* in ignorance of the former decision, and cannot be regarded as correct. The Act, as construed by the Exchequer Chamber, requires that the contract shall ascertain the sum and the time; the certainty of both must appear from the contract. But still if all the elements of certainty appear by the contract, and nothing more is required than an arithmetical computation to ascertain the exact sum or the exact time for payment, that will be sufficient.

It becomes necessary, therefore, to ascertain how the facts stand as regards verification and demand. For the purpose of this inquiry it will be convenient to consider, first, the accounts other than those relating to the *Shorncliffe* and *Cheriton Arch* traffic, and, secondly, the accounts relating to such traffic. The defendants always denied their liability to account for the *Shorncliffe* and *Cheriton Arch* traffic, and they never, therefore, sent in or exchanged any account of it. They did, however, before the commencement of the action send in and exchange accounts of all the other traffic. Hence the necessity for distinguishing between the two.

(1) Law Rep. 9 Q. B. 99. (2) Law Rep. 10 Q. B. 371.

The accounts which were sent in and exchanged before action were not, in fact, verified, and the non-verification of these exchanged accounts is, in my opinion, proved by the evidence to have been the fault of the Plaintiffs themselves. This clearly was so before action, and although after the action the Defendants repudiated the whole agreement, and the Plaintiffs might well, therefore, have said it was useless after that to verify any of the accounts, yet the Plaintiffs did not do this but excused themselves for their delay by urging press of business, as appears from the letters of the 8th of May, 1889, and the 7th of June, 1889. Under these circumstances I am of opinion that the Plaintiffs cannot successfully ask the Court to treat the exchanged accounts as if they had been duly verified, and no interest ought to be allowed on the sums found due in respect of the traffic to which I am now alluding. After action some accounts were verified, but no demand with notice that interest would be claimed was made as required by the statute, so as to entitle the Plaintiffs to interest even on these.

The *Shorncliffe* and *Cheriton Arch* traffic ought to have been brought into account by the Defendants. This has been decided by the House of Lords, and the account of what became due from the Defendants to the Plaintiffs in respect of this traffic ought to be taken as if the Defendants had furnished and exchanged proper monthly accounts of it pursuant to *Smithells'* award. If that had been done there would still have remained acts to be done by the Plaintiffs—viz., verification and demand for payment and notice claiming interest before the amount actually payable could be ascertained and made to carry interest; and the non-verification by the Plaintiffs of any one account would suspend their right to further payments even on account. Unless, therefore, the Court can infer that if these accounts had been furnished and exchanged the Plaintiffs would have verified them, and have demanded payment of them when verified, and have given notice claiming interest, the Court cannot order interest to be paid upon them. I should myself have been ready to infer as a fact that the Plaintiffs would have verified these accounts and have demanded payment and interest if they had not omitted to verify the accounts which were

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exchanged, and which they had an opportunity of verifying, and if they had demanded payment with interest on those accounts which were verified; but, in the face of their own want of diligence in verifying the accounts which were exchanged and in complying with the statute, I feel unable to draw the inference necessary to entitle the Plaintiffs to interest, even on the amount found due to them in respect of the *Shorncliffe* and *Cheriton Arch* traffic. The result, therefore, is that the appeal, so far as it relates to interest, must be allowed in its entirety.

BOWEN, L.J.:—

I have discussed this matter with my learned brothers, and I take the same view exactly as Lord Justice *Lindley*. I will only add a few words upon the point of interest.

If an action is brought for a debt or a sum which has become due under an agreement, interest can only be recovered in certain cases. It can be recovered if it is expressly reserved by the contract between the parties, or if the payment of it is to be implied by the course of dealing between them. If this is not so, if neither of those conditions is fulfilled, it can only be recovered under the statute. The jury in such a case may if they think fit, and the Court, which has the same power as a jury, may if it thinks fit, allow interest to a creditor at a rate not exceeding the current rate of interest, if the debt or sum is payable by virtue of a written instrument at a certain time; and upon the construction of that portion of the statute, as the Lord Justice has pointed out, we are bound by the decision in the Exchequer Chamber in *Merchant Shipping Company* v. *Armitage* (1).

But there is a second mode in which the case of the Plaintiffs' claim for interest has been put. Independently altogether of actions which are brought for debts or sums which have become due under an agreement, an action may well lie of this kind. It may lie for the breach of an agreement, the fulfilment of which agreement might have resulted in the ascertainment of a sum certain upon which interest might have been obtained under the statute. It might have been obtained under the statute if it had arisen

(1) Law Rep. 9 Q. B. 99.

upon a written instrument at a certain time, as I have pointed out, and it might also arise under the statute, if a demand was made. If the action of the Plaintiffs is to be taken as an action for breach of an agreement, the fulfilment of which would have resulted in the ascertainment of a sum capable of carrying interest by the verdict of the jury, either by reason of its being a debt payable at a certain time, or of its becoming payable on a demand, in such a case of special damage the interest might be recoverable for breach of the agreement, the fulfilment of which might have resulted in what I have said. We have, therefore, to consider the Plaintiffs' action with a view of making up our minds whether in this case the conduct of the Defendants has been the cause of the Plaintiffs' losing their opportunity of obtaining interest. That seems to me at Common Law to be the way in which the case must stand.

Then, with regard to the joint traffic agreement, the Court of Equity has always exercised the jurisdiction of dealing with complicated accounts, accounts the taking of which in a Court of law would be attended with incovenience and delay, and when a Court of Equity is dealing with matters of that description it endeavours to prevent the plaintiff being injured by the conduct of the defendant, which has prevented the account assuming a liquidated form, and which places the plaintiff in such a position as he would not have been in had the Defendants done what it was their duty to do under the contract. It is upon the basis of such a view of indemnifying the Plaintiffs against the conduct of the Defendants, which has prevented the account being a liquidated one, that the form of the decree, I apprehend, takes the shape it does, and gives an account down to the time of the writ. But treating the action either from the point of view of Common Law as an action for breach of agreement, or in Equity as an action for the rectification of accounts between the parties, still you have to ask yourself before giving interest the same question, is this case one in which the Defendants have, by their default in not completing an agreement under which an account might have been taken, been the cause of the Plaintiffs losing the opportunity of getting interest under the statute? It seems to me, for the reasons which the Lord

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Justice has given, that in this case the delay on the part of the *London, Chatham and Dover Railway Company*, in doing what was necessary on their part, in verifying the accounts, prevents us from drawing the inference of fact that the loss of interest in this case has been due to the Defendants' conduct. As regards the rest of the judgment of Lord Justice *Lindley* I express my entire concurrence.

KAY, L.J.:—

The question whether any and what interest should be allowed in taking the account in this case involves considerations of general importance.

It has never been the practice by our law to allow interest upon all debts merely on the ground of delay in payment. After judgment interest at 4 per cent. is payable by 1 & 2 Vict. c. 110, s. 17. Before judgment interest is payable where there is a demand for payment of the debt and interest upon it by 3 & 4 Will. 4, c. 42, s. 28. Also under the same section when the sum is certain and the time of payment is fixed by some written instrument. There are conflicting decisions upon the question whether the time is so fixed within the meaning of the statute when that instrument makes the day of payment depend upon some future event which may or may not happen; for example, if the sum is by the written instrument payable seven days after the amount should be agreed between the parties, or seven days after the happening of some other future contingent event. In the *Merchant Shipping Company* v. *Armitage* (1), by charterparty, the time for payment of the freight was two months after the date of the ship's report inwards at the Custom House. The Court decided that the full stipulated sum was payable though part of the cargo had been lost by fire, but they refused to give interest upon the ground that the principal sum was not payable at a time certain. It is said that there was not much argument upon this point. But the Court reserved judgment until the following day, and it was therefore a considered judgment. It was a decision of the Exchequer Chamber by which we should feel ourselves bound. In *Duncombe* v. *Brighton Club*

(1) Law Rep. 9 Q. B. 99.

and Norfolk Hotel Company (1), little more than a year later, the Court of Queen's Bench seem to have come to a different conclusion, Lord *Blackburn* however dissenting. The decision of the Court of Exchequer Chamber was not cited; but Lord *Blackburn* had evidently some knowledge of it, because he says he had an idea that the point had been decided. It seems to me that we must treat the decision of the Exchequer Chamber as the binding authority on this point.

There has not been in this case any judgment for payment of the amount now claimed, nor any demand which would entitle the Plaintiffs to interest. It has been argued, however, that it is money made payable at a time certain by a written instrument. By the original agreement between the two companies of the 7th of September, 1865, the money was not made payable by one company to the other. Their gross receipts were to be brought into a common fund and dealt with by a joint committee whose duty was, after making certain deductions, "to apportion the net receipts." There is not in express terms any direction for payment to either company, but on the 22nd of September, 1868, an award was made by Mr. *J. Smithells*, and adopted by both companies, which altered this arrangement and directed, in effect, that each company should render monthly to the other an account of its receipts from which the joint agreement account was to be compiled and exchanged, and 75 per cent. of the balance appearing on the face of the accounts so exchanged (which means undoubtedly the joint agreement accounts) was to be paid not later than the 15th day of the next month after such exchange. The balance of the account was to be agreed, and included in the next month's payment. Thus, supposing the accounts to be exchanged in the next month after this award, 75 per cent. of the balance appearing on them to be due to the receiving company must be paid by the 15th of the next following month. The balance, if agreed, would be paid with the next payment of 75 per cent. If not agreed, the payment must wait until it was agreed; 75 per cent., however, would be payable every month upon the accounts exchanged without any agreement as to the balance. But in order to prevent improper

(1) Law Rep. 10 Q. B. 371.

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delay in verifying the accounts, the award provided that if such verification was not completed by the end of two months after the date of exchange "by the balance-receiving company, the payments on account shall cease until such verification is completed."

What happened was this. Incomplete accounts were exchanged down to the month of December, 1884. In that month the writ in this action was issued. These accounts were incomplete because the *South-Eastern Railway Company* did not include certain local traffic called in this argument the *Shorncliffe* traffic, which ought to have been included. The *London, Chatham and Dover Company* were the balance-receiving company nevertheless. If the *Shorncliffe* traffic had been included, the balance coming to them would have been larger. The dispute between the companies whether this traffic ought to be included had arisen some time before. The *London, Chatham and Dover Company* had neglected, since December, 1878, to verify the accounts which they had received. The evidence consisting of their own letters, particularly the letters of their Secretary, Mr. *Morgan*, dated May 8th and June 7th, 1889, makes it clear that this neglect was not because they considered the accounts improper, by reason of this omission of local traffic, but that they had not found time to verify the accounts actually received. Therefore they, the balance-receiving company, committed the default contemplated by the award, the consequence of which was that the payments were to cease. It follows from this statement that no interest could be payable under the statute on the unascertained monthly balances beyond 75 per cent., both for the reason that the time for payment was uncertain, because these balances were not fixed, and also because the amount of each of them was not certain.

But also the 75 per cent. payments had ceased to be payable before the action, and therefore it seems to me to be equally impossible to claim interest upon those amounts. They were not only not payable on days certain, but by the terms of the award they were not payable at all until the verification, which was in arrear, was "completed."

The *South-Eastern Railway Company*, although they made pay-

ments on account from time to time, raised a contention that the agreement and award were altogether invalid, and in February, 1885, after the commencement of the action, they ceased to render any accounts. In February, 1886, the agreement was held by the Court to be valid, and this was affirmed in July, 1886, and again on the 14th of May, 1888, by the House of Lords. In July, 1886, the exchange of accounts was resumed. In November, 1887, judgment was given in the action. On the 2nd of August, 1888, a four-day order was made for accounts under the judgment. On the 9th of November, 1888, the judgment was affirmed on appeal.

The accounts have now been taken before an official referee, and by his report, dated the 18th November, 1890, he has allowed interest at 5 per cent. per annum upon the balances due in respect of the *Shorncliffe* traffic, wrongly omitted since the 1st of July, 1881, and upon the other balances due since the 1st of July, 1885, and in both cases down to the end of the account taken by his award. In paragraph 4 he states that he has allowed such interest under the statute 3 & 4 Will. 4, c. 42. If the account was one in which each balance carried interest, either by the contract or under the statute, it would be in accordance with the usual practice in the Chancery Division, to calculate the interest down to the end of the account taken by the referee's report, which for this purpose is equivalent to a chief clerk's certificate. The balances due do not carry interest, in my opinion, upon either of these grounds.

It was suggested, I think rather by the bench than by counsel, that possibly damages for the delay in paying these balances might be given in the nature of interest—that is, computed as though a certain rate of interest were payable. Such damages may be given in some kind of actions. By the 3rd & 4th Will. 4, c. 42, s. 29, the jury may give damages in the nature of interest in all actions of trover or trespass *de bonis asportatis*, and in actions on policies of assurance made since that statute. Independently of the statute, Courts of Common Law gave such damages in certain other actions, as for example for breach of a contract to give a bill of exchange which, if given, would carry interest. In such an action the Court may

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direct a jury to give damages for loss of the interest to which the plaintiff would have been entitled: *Becher* v. *Jones*, reported in a note to *De Bernales* v. *Fuller* (1), and see *Farquhar* v. *Farley* (2). It was suggested that it might be argued that this is an action for breach of a contract which, if it had been carried out, would have entitled the Plaintiffs to interest, or rather would have enabled them to make a demand which would have so entitled them, and if by reason of the default of the Defendants, the contract has not been carried out, damages in the nature of interest ought to be given. There are considerable technical difficulties in the way of giving this relief, not the least of which is the fact that the Plaintiffs have considered the action rather as one for specific performance of the contract than an action for damages for breach, and the pleadings certainly do not ask for damages. But I need not consider these difficulties. If the case were one in which justice required that such damages should be given, the Court would not be prevented, under our present system, by any technical difficulty from doing justice. But I am satisfied that it would not be just to give such relief in any form. It was not the default of the Defendants which prevented the money being payable. Both Plaintiffs and Defendants were in fault, but the default of the Plaintiffs seems to me to have been entirely independent of that of the Defendants, and such as made it impossible for them to treat the money that was due at the time when this action was commenced as a debt that was then payable. Nothing was then payable. It follows that there was nothing which should be treated as carrying interest.

If the *Shorncliffe* traffic had been included in the accounts rendered by the *South-Eastern Company*, I am satisfied that the *London, Chatham and Dover Company* would still have been in default. The omission of the traffic does not seem to me to better the claim for interest upon the whole account. Does it entitle the *London, Chatham and Dover Company* to interest upon the amounts found due in respect of the *Shorncliffe* traffic? There is more to be said for this portion of the claim, but, again, I cannot myself resist the answer which has been made. The non-verification by the *London, Chatham and Dover Company* has

(1) 2 Camp. 428. (2) 7 Taunt. 592.

put an end before action to their right to treat any part of the indebtedness of the *South-Eastern Railway Company* as payable. By the terms of the award the payments on account were to cease. The default of the *London, Chatham and Dover Company* affected this portion of the claim also, though, no doubt, as to this the *South-Eastern Railway Company* were also, and chiefly, in default. But their default was not a refusal to pay what they knew to be due. There was a *bonâ fide* and not unreasonable dispute as to the *Shorncliffe* traffic being local traffic within the agreement. A delay in payment in consequence of such a dispute does not usually entitle a plaintiff who recovers his debt to interest. Where the refusal to pay is contumacious or wrongful, there is authority for saying, both in equity and at law, that the Court might give interest; as in *M'Intosh* v. *Great Western Railway Company* (1), where the engineer's certificates were withheld, which disabled the plaintiffs from suing at law, or making a claim for interest under the statute. So at Common Law, where a debt which did not carry interest was wrongfully detained, damages for the delay were given, Chief Justice *Best* saying, "It appears there are two principles on which interest is given in our Courts: first, where the intent of the parties that interest should be paid is to be collected from the terms or nature of the contract; secondly, where the debt has been wrongfully detained from the creditor." Those words are in the judgment in the case of *Arnott* v. *Redfern* (2), and a similar decision was arrived at in *Hilhouse* v. *Davis* (3). On the whole, I do not think it would be according to law or justice to give interest in this case upon any part of the claim, and I therefore hold that the items of interest should be struck out.

Solicitors for the Plaintiffs: *C. & S. Harrison & Co.*
Solicitor for the Defendants: *W. R. Stevens.*

M. W.

(1) 4 Giff. 696. (2) 3 Bing. 360.
(3) 1 M. & S. 169.

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NORTH, J.
June 2.
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Dec. 1, 2, 3, 18.

In re SHARPE.
In re BENNETT.
MASONIC AND GENERAL LIFE ASSURANCE COMPANY *v.* SHARPE.

[1889 S. 2119.]

Company—Winding-up—Liability of Directors—Payment of Interest out of Capital—Statute of Limitations—Stale Demand.

By the articles of association of a company incorporated in 1868, it was provided that interest on the money paid up on the shares should be paid to the shareholders until otherwise determined by the directors; and that no dividend or bonus should be payable except out of the profits. No profits were made by the company; but the directors paid interest to the shareholders out of the capital of the company until 1878, when the Board of Trade interfered, and the directors ceased to pay interest. *B.* was a director from 1869 till his death in 1883. In 1886, the company was wound up; and in 1889 the liquidator commenced an action against the personal representatives of *B.*, seeking to make his estate liable for the money paid as interest to the shareholders out of capital while he was a director:—

Held (affirming the decision of *North*, J.), (1.) that the payment of interest out of the capital when there were no profits was *ultrà vires* notwithstanding the clause in the articles of association; (2.) that the directors, being in the position of trustees, the *Statute of Limitations* was no bar to the action; and (3.) that there was no such delay, either before or after the commencement of the winding-up, as to render the claim of the liquidator a stale demand in the view of a Court of Equity. The Defendants were, therefore, held liable to make good out of *B.'s* estate the payments made during the period of his directorship, with interest at 4 per cent.

THE action in this case was brought by the *Masonic and General Life Assurance Company, Limited,* now in liquidation, against the personal representatives of two deceased directors, Captain *H. A. Bennett* and *A. G. Sharpe,* to recover from their estates certain sums of money alleged to have been improperly paid out of the capital of the company as interest or dividend when the company had made no profit.

The facts were shortly as follows:—

The company was incorporated under the *Companies Acts,* 1862 and 1867, on the 23rd of January, 1868. Among the articles of

association were the following, on which the questions in the action principally turned:—

Art. 5: "The capital of the company shall be allotted by the Board when and as they think fit. Every applicant for shares shall pay £1 per share on application. Interest at the rate of £5 per cent. per annum shall be payable half-yearly on all money paid on the shares, until otherwise determined by the directors."

Art. 115: "The Board may, with the sanction of a general meeting, declare a dividend or bonus, or both a dividend and bonus, to be paid to the shareholders in proportion to their shares, but exclusive of any amount for the time being paid up in advance of calls, and subject to any special privileges and priority for the time being subsisting with regard to any particular share."

Art. 116: "No dividend or bonus shall be payable except out of the profits arising from the business of the company, including the income arising from the paid-up capital."

Art. 119: "The directors may, after providing for the payment of 5 per cent. per annum to the members, and before recommending any dividend or bonus, set aside out of the profits of the company such a sum as they think proper as a reserve fund, and may invest the same upon any such securities as they think fit."

Sharpe was one of the original directors, and died in April, 1883.

Captain *Bennett* was appointed a director on the 27th of May, 1869, and continued to act as a director until his death. He died in December, 1883, having appointed the Defendant, *J. A. Bennett*, his executor.

No regular profit and loss account was ever made up, and the company never earned any profits; but the directors made half-yearly payments at the rate of £5 per cent. per annum on the amount of the shares paid up from July, 1869, to July, 1878, and in their returns to the Board of Trade described these payments as dividends, when the Board of Trade interfered, and the directors then passed a resolution to discontinue the payments in future. The amount thus paid amounted to upwards of £4500.

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On the 13th of March, 1886, the company was ordered to be wound up. The present action was commenced by the liquidator on the 4th of June, 1889, claiming a declaration that *Sharpe* and *Bennett* were guilty of misfeasance and breach of trust in applying the capital of the company in payment of dividends or bonus on shares, and payment of the amount found due out of their estates.

The Defendant, *J. A. Bennett*, died during the progress of the action, and the proceedings were continued against his executors.

The executors of *Sharpe* came to a compromise with the liquidator, and the action was continued against the personal representatives of Captain *Bennett* alone.

At the time of the hearing of the action, the liquidator was too ill to attend as a witness; but his partner was examined. No charge was brought against him of unreasonable delay in commencing the proceedings.

The action was heard before Mr. Justice *North* on the 2nd of June, 1891.

Cozens-Hardy, Q.C., and *S. Eady*, for the Plaintiffs, cited *Rance's Case* (1); *Leeds Estate Building and Investment Company* v. *Shepherd* (2); *In re Mammoth Copperopolis of Utah* (3); *Stringer's Case* (4).

S. Hall, Q.C., and *Oswald*, for the Defendants, referred to *Symonds* v. *City Bank* (5); *In re Mammoth Copperopolis of Utah*; *In re Alexandra Palace Company* (6).

NORTH, J.:—

I think the case is a very clear one. Captain *Bennett*, whose estate is represented by the Defendants, became a director of the company in the year 1869, and, from that time down to the year 1878, he and the other directors, acting together, made half-yearly payments to the shareholders by way of interest upon their shares, although no profits were realized by the company. It is established by the evidence, that in no one year or half-

(1) Law Rep. 6 Ch. 104.
(2) 36 Ch. D. 787.
(3) 50 L. J. (Ch.) 11.
(4) Law Rep. 4 Ch. 475.
(5) 34 W. R. 364.
(6) 21 Ch. D. 149.

year was there a single penny of profit—in fact, there was not one year or half-year in which the company's expenditure did not exceed their gross profits in respect of premiums. Under what circumstances were these payments made? The 5th clause of the articles provided that, "Every applicant for shares shall pay £1 per share on application. Interest at the rate of 5 per cent. per annum shall be payable half-yearly on all moneys paid on the shares, until otherwise determined by the directors." At the same time, clause 116 provided that, "no dividend or bonus shall be payable except out of the profits arising from the business of the company, including the income arising from the paid-up capital."

Now, what, in fact, took place was this: The directors in each half-year during the period which I have mentioned paid interest at 5 per cent. upon the sums which had been paid up in respect of each of the shares in the company; and they did this in pursuance of a formal resolution that the interest should be paid; and the cheques and books have been produced. They had regular printed forms which were used for the purpose, in which each payment which was made in this way purported to be made on interest account, and it was made by way of a cheque which was called a "dividend warrant." This continued down to July, 1878, when the Board of Trade interfered, and no further payments were made, except some small sums which were paid to shareholders who had become entitled to them before, but for some reason or other had not received them. In 1886 the company went into liquidation, and the liquidator has taken the present proceedings.

Were, then, these payments warranted? In my opinion, they were not warranted by the articles or by anything else. The payments were clearly made by way of dividend upon the shares; they were not made out of profits, and they were made under circumstances under which no one could for a moment believe that they were made out of profits. The fact that the receipts of the company did not equal the expenditure was in itself conclusive upon that point. Moreover, none of the steps were taken which have been considered in some cases to justify directors in making a payment in respect of dividend in the *bonâ fide* belief that

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there were profits, when in point of fact there were none. None of the ordinary steps were taken which directors who are acting carefully and diligently ought to take, to have the accounts properly made out in such a manner as to enable them to say whether there was a profit or not. As a matter of fact, no profit and loss account was ever made out from the beginning to the end of the company. How, under such circumstances, could the directors be justified in proceeding upon the footing that there was a profit? No one has ventured to say that they ever believed that there was a profit. There is no record of any sort indicating that any one even thought that there was, and as a matter of fact it is perfectly clear that there was not any profit.

This case seems to me exactly on the lines of the cases which were cited by Mr. *Cozens-Hardy*. It is sufficient to refer to *Rance's Case* (1), decided upwards of twenty years ago, soon after this company was formed, which shews that directors cannot rely upon accounts which have been made out for them by properly authorized officials and competent experts when, in point of fact, the accounts which are essential for the purpose of ascertaining whether there is a profit or not have never been made out at all.

That being so, I am clearly of opinion that the directors were liable in respect of these payments. It has been said on both sides that the directors were acting, or that, at any rate, Captain *Bennett* was acting, honestly in the matter. I do not wish to suggest the contrary for a moment; but I do say this, that he and the other directors who were acting with him certainly did not do their duty to the shareholders in not having the proper accounts made out before any such payment was thought of for a moment. Under these circumstances, in my opinion, these payments of interest were all improperly made.

Then the second question arises, whether, that being so, I ought to decline to give relief on the ground that the claim is in the nature of a "stale demand." Lord Justice *Fry*, in *In re Alexandra Palace Company* (2), distinguished the case then before him from *In re Mammoth Copperopolis of Utah* (3) and

(1) Law Rep. 6 Ch. 104. (2) 21 Ch. D. 149.
(3) 50 L. J. (Ch.) 11.

Stringer's Case (1), by pointing out that in the case before him the circumstances were such as correspond exactly with those of the present case. He says (2): "The transaction stands disclosed in the simplest way. There is no balance-sheet which it can be for a moment suggested induced the directors to come to the conclusion that there were divisible profits. It is a simple case in which the capital of the company or the moneys borrowed by the company were applied in the payment of that which, according to the plain terms of the articles of association, could be paid only out of profits. I think, therefore, that the observations made in those cases do not apply, and I must ask myself whether independently of them, and on general principles, I can hold that this is so stale a demand that the Court ought to grant no relief."

Now, how do the facts stand here? It is true that these payments were made a long time ago; but I cannot find a trace of any reason for believing that any evidence has been lost by the delay which has taken place. It is true that Captain *Bennett* has died in the meantime; but I have the records of the directors' proceedings before me—the reports, the minutes, and so on—and I cannot imagine, nor has it been suggested, that there is anything indicating that any defence or explanation might have been available to him, if he had been alive, which by reason of his death is not forthcoming. Then, as regards the suggestion that this is a stale demand, the first question is, is it barred by the statute? Clearly it is not; and, unless the statute bars the claim, I do not see what other time I can fix. The liquidator does certainly seem to have been somewhat dilatory in taking these proceedings. I have not heard any reply upon this point; and it may be that some explanation might be given which is not before me. But, assuming that he was dilatory in waiting for three years and three months from the time when the liquidation commenced before instituting these proceedings, I do not see why, because he has been dilatory, the creditors, for the purpose of paying whose debts the present claim is being made, are to lose their rights. If I had thought that by reason of that delay the parties against whom the proceedings are taken had

(1) Law Rep. 4 Ch. 475. (2) 21 Ch. D. 162.

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been prejudiced, I might have held that the liquidator was precluded from recovering, and, if he could not recover, the persons on whose behalf he was suing would have failed to recover also. But I cannot see any reason why the creditors ought not now to be paid, or that there is anything in the lapse of time which ought to deprive them of a right which, upon this hypothesis, they clearly would have had but for the delay which has taken place. In my opinion, the claim must succeed, and the Plaintiffs are entitled to judgment.

The only question is as to the proper way of arriving at the exact sum which the Defendants ought to pay. I understand that neither party wishes to incur the expense of an inquiry upon the point. All the materials for arriving at the amount are before me. The amount of the wrongful payments is correctly stated in the particulars, and will carry interest at £4 per cent. In order to arrive at the amount payable by Captain *Bennett's* estate, credit must be given for the sums which have been received from the other directors, and, of course, interest must be allowed at the same rate upon those sums from the times at which they were respectively paid. In this way the sum which remains due from the estate of Captain *Bennett* will be ascertained.

The most convenient course, I think, will be, that some one should make an affidavit giving the exact figures, and then the judgment should be for the sum stated in the affidavit.

W. L. C.

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From this judgment the personal representatives of Captain *Bennett* appealed. The appeal came on for hearing on the 1st of December, 1891.

Crackanthorpe, Q.C., and *Oswald*, for the Appellants:—

The money paid to the shareholders was not paid by way of dividend, but as interest on a debt, and its payment was made imperative on the directors by the 5th article. The 116th article refers to dividends properly so called, not to interest payable under the 5th article. Therefore, assuming that the directors who ordered the payment of interest acted beyond their powers,

the mistake was an innocent one, and they ought not to be held liable: *London Financial Association* v. *Kelk* (1); *Pickering* v. *Stephenson* (2). And if they were originally liable the *Statute of Limitations* is a bar to the present claim. This action is on behalf of the creditors, and the directors were not trustees for them. They were only managers on behalf of the shareholders; they had no funds in their hands: *Buckley* on Joint Stock Companies (3). If they were in some sense trustees for the shareholders they cannot be held guilty of a breach of trust towards them, while they were acting in obedience to the express directions of the articles, and with the acquiescence or sanction of the shareholders: *Poole, Jackson and Whyte's Case* (4); *Stringer's Case* (5); *In re Dronfield Silkstone Coal Company* (6). If the *Statute of Limitations* is not legally a bar, we rely on the analogy of the statute and the doctrine of the Courts of Equity against stale demands.

[FRY, L.J.:—Has the analogy of the statute ever been applied to a claim arising from a breach of a fiduciary relation?]

Yes; from the time when the wrongful act is discovered the statute runs: *Metropolitan Bank* v. *Heiron* (7). That was a case of fraud, and the present case is more favourable, as it is not a case of dishonesty but of an act *ultrà vires* done *bonâ fide*. Courts of Equity have always discouraged stale demands: *Smith* v. *Clay* (8); *Bond* v. *Hopkins* (9); *Hovenden* v. *Lord Annesley* (10); *In re Alexandra Palace Company* (11). The winding-up makes no difference; if the *Statute of Limitations* has begun to run against the going company it continues to run against the company in liquidation. The liquidator only represents the company: *In re Duckworth* (12). There has been great delay both before and since the commencement of the winding-up. The liquidator has no higher right than the company. The last payment of interest was in 1878, Captain *Bennett* died in 1883, and the company was

(1) 26 Ch. D. 107, 144.
(2) Law Rep. 14 Eq. 322.
(3) 6th Ed. p. 516.
(4) 9 Ch. D. 322.
(5) Law Rep. 4 Ch. 475.
(6) 17 Ch. D. 76, 97.
(7) 5 Ex. D. 319.
(8) 3 Bro. C. C. 639, n.
(9) 1 Sch. & Lef. 413.
(10) 2 Sch. & Lef. 607, 630.
(11) 21 Ch. D. 149.
(12) Law Rep. 2 Ch. 578, 580.

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wound up in 1886, and neither before nor after his death were any proceedings taken by the company. Even after the commencement of the winding-up there was great delay, for the liquidator was appointed in 1886, and he took no proceedings till 1889: *In re Mammoth Copperopolis of Utah* (1). Mr. Justice *North* said that we had not shewn that we were prejudiced by the delay; but there is no rule that a person against whom a stale demand is made must shew that he is prejudiced by its not having been brought sooner. The case was treated in the Court below as one of false balance-sheets and dividends declared on the strength of them; but no such case is made out. The directors never represented that the company was making a profit. The accounts were duly audited, which is important as regards the liability of the directors: *In re Denham & Co.* (2). If the returns to the Board of Trade were inaccurate, persons deceived might have a remedy, but not the company: *In re Ambrose Lake Tin and Copper Mining Company* (3).

The allowance of interest is in any event wrong. The Court will not give interest where an innocent mistake has been made: *Bruere* v. *Pemberton* (4); *Purcell* v. *Blennerhasset* (5); *Merry* v. *Ryves* (6). The money never came to the hands of the directors; they had only the control of it.

Sir *H. Davey*, Q.C., *Cozens-Hardy*, Q.C., and *S. Eady*, for the liquidator:—

Directors, though they are not exactly trustees, are liable for the misapplication of the funds of the company in the same way as if they were trustees. The directors misapplied the company's funds, and what is their defence? That they thought they were acting under art. 5, and that art. 116 did not apply. But in the returns to the Board of Trade the payments they made were called "dividends to shareholders." Then they rely on lapse of time. But who could have sued them before the winding-up? They managed the whole affairs of the company till that time. The only delay, therefore, is that they did not

(1) 50 L. J. (Ch.) 11.
(2) 25 Ch. D. 752.
(3) 14 Ch. D. 390, 397.
(4) 12 Ves. 386.
(5) 3 J. & Lat. 24.
(6) 1 Eden, 7.

sue themselves in the name of the company; and the shareholders could not do anything except change the directors. The *Statute of Limitations* has nothing to do with a case like the present, nor has *Metropolitan Bank* v. *Heiron* (1) any bearing upon it. *Heiron's Case* was a case of claim for an equitable tort; the money claimed had never been in the company's possession and was not the company's money till judgment was obtained. But where a person has money of the company in his hands the *onus* is on him to discharge himself of it. *Evans* v. *Coventry* (2) is an instance of a demand similar to that in the present case being enforced against directors. The payment of dividends out of capital was a wholly unauthorized act. In *In re National Funds Assurance Company* (3), which is very like the present case, it was held that one of the articles of association did not, as had been contended, authorize payment of interest out of capital, and the directors were ordered to replace the sums so paid, and it was held that the acquiescence of the shareholders made no difference. The shareholders for the time being could not so ratify an act which was *ultrà vires* as to bind a new body of shareholders. *Flitcroft's Case* (4), *In re Oxford Benefit Building and Investment Society* (5), *Lister & Co.* v. *Stubbs* (6), and *Leeds Estate Building and Investment Company* v. *Shepherd* (7), are also applicable. And if the *Statute of Limitations* does not apply there is no ground for treating this claim as a stale demand. While the company was a going concern the creditors could not sue the directors, for they were not trustees for the creditors. There could not be acquiescence on the part of the company for acquiescence implies consent: *Life Association of Scotland* v. *Siddal* (8); and the company could not consent to an *ultrà vires* act. Even if all the shareholders had individually consented, the company as a corporation could not have been bound: *In re Mammoth Copperopolis of Utah* (9). The loss of evidence is sometimes urged as a ground for opposing a stale demand; but here there is no loss of evidence: the facts are all clear from the minutes of the board.

(1) 5 Ex. D. 319.
(2) 8 D. M. & G. 835; 26 L. J. (Ch.) 400.
(3) 10 Ch. D. 118.
(4) 21 Ch. D. 519.
(5) 35 Ch. D. 502.
(6) 45 Ch. D. 1.
(7) 36 Ch. D. 787.
(8) 3 D. F. & J. 58.
(9) 50 L. J. (Ch.) 11.

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With respect to the time which has elapsed since the commencement of the winding-up, in the first place the liquidator could not consent to an *ultrà vires* act any more than the company. And on the winding-up new rights arise, namely, those of the creditors; and the liquidator becomes a trustee for them as well as for the company: *Waterhouse* v. *Jamieson* (1); *In re National Funds Assurance Company* (2); *Oakes* v. *Turquand* (3): *Tennent* v. *City of Glasgow Bank* (4). But there was in truth no unreasonable delay on the part of the liquidator. He would have done wrong if he had rashly commenced litigation. Some delay was also caused by his illness; and although his partner was examined and cross-examined at the hearing, no charge was made of delay. We claim interest at 4 per cent. on the payments to which Captain *Bennett* was a party: *Evans* v. *Coventry* (5).

Crackanthorpe, in reply, on the question of delay, referred to *Gray* v. *Lewis* (6), *Ferguson* v. *Wilson* (7); *Russell* v. *Wakefield Waterworks Company* (8); and as to interest, *In re British Guardian Life Assurance Company* (9); *Smith* v. *Anderson* (10).

1891. Dec. 18. LINDLEY, L.J.:—

The Plaintiff company is a life insurance company, formed and registered under the *Companies Act*, 1862, on the 23rd of January, 1868. The company was registered with limited liability, and with its capital divided into shares. Its articles of association are important. [His Lordship referred to articles 5, 115, 116 and 119, which are set forth above, and continued:—] Whether the fifth article is to be regarded as controlled by article 116, so as to authorize the payment of 5 per cent. on the paid-up capital only out of profits, is, I think, open to considerable doubt. The directors of the company, acting apparently with perfect *bona fides*, construed the articles as requiring them to pay interest at 5 per cent. on the paid-up capital until they should otherwise determine; and acting on this view they did pay such interest,

(1) Law Rep. 2 H. L., Sc. 29.
(2) 10 Ch. D. 118.
(3) Law Rep. 2 H. L. 325.
(4) 4 App. Cas. 615.
(5) 8 D. M. & G. 835, 845.
(6) Law Rep. 8 Ch. 1035.
(7) Ibid. 2 Ch. 77.
(8) Ibid. 20 Eq. 474.
(9) 14 Ch. D. 335, 347.
(10) 15 Ch. D. 247, 275.

although there were no profits, and they did this for about ten years, when their attention was called to the matter by the Board of Trade in 1878, and then they determined to discontinue the payments. They sent a circular (dated the 9th of December, 1878) to the shareholders explaining that in future payment of interest would cease, and from that time no such interest has been paid. The company never made any profits. On the 13th of March, 1886, the company was ordered to be wound up. It was insolvent, and on the 4th of June, 1889, this action was commenced against the executors and residuary legatees of two deceased directors—*Sharpe* and *Bennett*—in order to recover the assets of the company paid away as interest by them whilst they were directors. Mr. Justice *North* has given judgment against the Defendants, and from this judgment *Bennett's* legal personal representatives have appealed. *Bennett* was a director from May, 1869, until the 21st of December, 1883, when he died; and this action was commenced within six years after his death. Whatever may be the true construction of the 5th article, it is conceded by the Appellants that the payment of interest when there were no profits was a misapplication of the assets of the company, and was *ultrà vires*—by which I mean an act beyond any power which the company could confer on its directors. This proposition is beyond dispute after the numerous decisions on this point, including the decision of the House of Lords in *Trevor* v. *Whitworth* (1). It was, however, contended that, as the directors acted honestly and openly, and without in any way misleading the shareholders, the Court, though it might grant an injunction to restrain the continuance of an improper disposition of the funds of the company, would not go further and compel the directors to account for moneys actually misapplied. This contention was based on the judgment of the late Vice-Chancellor *Wickens* in *Pickering* v. *Stephenson* (2); but this Court has already had occasion to examine the soundness of this view, and has been unable to concur in it: see *Cullerne* v. *London and Suburban General Permanent Building Society* (3). As soon as the conclusion is arrived at that the company's money has been

(1) 12 App. Cas. 409. (2) Law Rep. 14 Eq. 322.
(3) 25 Q. B. D. 485, 490.

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applied by the directors for purposes which the company cannot sanction, it follows that the directors are liable to replace the money, however honestly they may have acted. Whether they can in their turn get it back from those persons who received it is another matter; but their own liability to restore it is now clearly settled.

The main ground, however, on which the Appellants relied was lapse of time: it was contended, first, that the action was barred by the *Statute of Limitations*; secondly, that if the statute did not apply, still the Court would act by analogy to the statute and refuse the relief sought; thirdly, that, at all events, the demand was a stale one, and so stale as to disentitle the company from obtaining any relief. The questions thus raised are of great importance and no little difficulty, and it is necessary to consider them with care.

First, as regards the *Statute of Limitations* itself. The statute which has to be considered is the statute of *James*, and not the 51 & 52 Vict. c. 59, relating to trustees, the action having been commenced before the 1st of January, 1890. An action by a principal against his agent, whether brought in the Queen's Bench Division or in the Chancery Division, is one of those to which the *Statute of Limitations* is applicable unless the agent is something more than a mere agent to conduct business for his principal and remit to him goods or money received on his account. But even in such a case it would seem that in an action for an account the statute does not begin to run until the agency is terminated: see *Burdick* v. *Garrick* (1). That the statute, then, does begin to run in the case supposed is settled by *Knox* v. *Gye* (2), in which a suit for an account by the executors of a deceased partner against his surviving partner was held barred by the *Statute of Limitations*, although an asset of the partnership had been got in by the defendant within six years before the commencement of the suit. But the duties of an agent are often much wider than those above alluded to; he is often more than an agent, and is a trustee, or has duties similar to those of a trustee; and in such a case an action against him is not barred by the *Statute of Limitations*:

(1) Law Rep. 5 Ch. 233. (2) Law Rep. 5 H. L. 656.

see *Burdick* v. *Garrick* (1), where the agent's duty was to invest his principal's money. Now a director of a company is certainly not a mere agent. It is his duty, amongst other things, to protect the company and to enforce its rights even against himself, and the conflict between his interest and his duty when he has misapplied the company's money prevents the *Statute of Limitations* from applying to an action brought against him by the company in order to recover such money. Although it is true that the company may be set in motion by other persons, it is by no means easy to do so, and these considerations have induced the Courts to treat a misapplication of the money of a company by its directors as a breach of trust to which the *Statute of Limitations* has no application—at least, while they are directors. See *Flitcroft's Case* (2), which is a clear decision of this Court on this very point. The liability of a director, in the case supposed, being treated as a breach of trust, I apprehend that the *Statute of Limitations* would not apply, even after a director had ceased to be a director: see *Metropolitan Bank* v. *Heiron* (3). In that case an action to recover money to which the plaintiff had a right, although it had never been his property, was held barred by the statute; but the difference between such an action and an action to recover trust money held by a trustee and misapplied is pointedly alluded to. The statute applies to actions to enforce a mere obligation to pay, but not to actions to recover trust property from a trustee who has misapplied it. It is, however, unnecessary to discuss this matter further, because the present action was commenced within six years after *Bennett's* death.

The same reasoning which prevents the *Statute of Limitations* from being a bar, renders it impossible to refuse relief by analogy to it.

There remains, however, the staleness of the demand, and this is, I think, the most difficult part of the case. Independently of the time which elapsed between the death of *Bennett* and the winding up of the company, there was considerable delay on the part of the liquidator before he commenced this action. When

(1) Law Rep. 5 Ch. 233. (2) 21 Ch. D. 519.
(3) 5 Ex. D. 319.

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the case was heard before Mr. Justice *North*, the liquidator was ill and unable to be examined; but his partner, Mr. *Godfrey*, who had assisted him in the winding-up, was examined in his stead, and was cross-examined by counsel on behalf of the present Appellants, and no suggestion was made of dilatoriness on the part of the liquidator. So far, therefore, as he is concerned, undue delay cannot be fairly laid to his charge. Still, the defence on the ground of the staleness of the demand is not thus disposed of. That staleness of demand as distinguished from the *Statute of Limitations* and analogy to it may furnish a defence in Equity to an equitable claim was settled at least as early as *Smith* v. *Clay* (1). The principles on which the doctrine is based will be found clearly set forth by the Privy Council in *Lindsay Petroleum Company* v. *Hurd* (2), and in the judgment of Lord *Blackburn* in *Erlanger* v. *New Sombrero Phosphate Company* (3). Whether these principles are applicable to the case of a company seeking relief in respect of a misapplication of its money which neither the directors nor the company could authorize or ratify has not, I believe, been decided, and need not be decided on the present occasion, for the circumstances of this case are insufficient to support a defence founded on the equitable doctrine in question. A defence based on staleness of demand renders it necessary to consider the time which has elapsed and the balance of justice or injustice in affording or refusing relief. I do not disregard, but I do not attach much importance to, the time which elapsed before Captain *Bennett's* death, nor, for reasons already given, to that which has elapsed between the winding up of the company and the commencement of the action. The remaining time is about two years and a quarter, which I do not consider long. The company could hardly be expected to move in the matter until pressed by its creditors; and the circumstance that this action is being brought for their benefit, and not for the benefit of the shareholders, is very material in considering which way the balance ought to incline. On the other hand, the Appellants have lost no evidence nor any remedy, for their testator never could have recovered

(1) Amb. 645. (2) Law Rep. 5 P. C. 221, 239.
(3) 3 App. Cas. 1218, 1279.

back money paid away by him under a mistake of law. His estate has probably been administered; but his executor, who has died, pending this action, was sole residuary legatee, and he did not in his pleadings allege, nor did the Appellants, who are his executors, adduce any evidence to prove that he had been induced by the Plaintiffs' delay to alter his position for the worse. He pleaded the *Statute of Limitations*, which affords no defence, and he pleaded staleness of demand, relying only on lapse of time. Under these circumstances, I cannot hold that this defence ought to prevail; and this conclusion is, I think, in accordance with the view taken in other cases of this description from *Evans* v. *Coventry* (1) down to the present time. The only case which affords any difficulty is *In re Mammoth Copperopolis of Utah* (2); but there the liquidator was himself in great delay, and in order to give relief it would have been necessary to ascertain whether the accounts presented to the shareholders were correct or not; and in this case there is no necessity to do anything of the sort. There is no suggestion here that profits were ever made, nor was the interest paid by the directors paid on the footing that there were any profits out of which to pay it.

The only other points to be noticed are the amounts with which *Bennett's* representatives should be charged, and the interest which they ought to pay. As to the amounts, it would not be right to charge them only with the interest ordered to be paid by Mr. *Bennett* himself, for he was present at almost all the directors' meetings at which the interest was paid; he knew what was being done, and he received his share of the interest ordered to be paid by his co-directors at the few meetings at which he was not personally present. He sanctioned the payments from first to last, and confirmed what his co-directors did in his absence.

As regards interest on the sums misapplied, the Court almost invariably charges a trustee with interest on trust money misapplied by him from the time of its misapplication; and although the Court has sometimes only given interest from the filing of the bill, yet this can only be properly done, if at all, under very special circumstances. The law on this point was carefully investigated

(1) 8 D. M. & G. 835. (2) 50 L. J. (Ch.) 11.

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by Mr. Justice *Chitty* in the case of *In re Hulkes* (1), and he there held, following the case of *Attorney-General* v. *Kohler* (2), that a trustee who had honestly paid trust money to the wrong person was liable to refund it with interest at 4 per cent. from the time when the right person ought to have received it. The trustee is treated as if he had the funds still in his hands. This is the principle on which the Court acts in such cases; and whatever may be thought of the principle itself, the result of it is justice to the person who has been wrongfully kept out of the enjoyment of his own money or of the interest to which he was entitled. I do not see any sufficient grounds in this case to depart from the general rule which is well established. The appeal, therefore, must be dismissed with costs.

BOWEN, L.J.:—

I am of the same opinion. I shall only add a very few words. With regard to the construction of the articles, I take the same view as Lord Justice *Lindley*. It seems to me that by the articles, if they stood alone, it might have been said that the directors were justified in what they did; but by the general law the act was one which was not only beyond their power as directors, but *ultrà vires* of the company, and one which the company had no power either to justify or sanction. There being no question of confirmation in this case, it seems to me that, for the reasons which have been given, down to the death of the directors, the statute could not run, nor could the analogy of the statute apply; and since the death of the directors of the company, if it was a case in which the statute might otherwise have applied—an idea which I do not myself entertain—the necessary period has not elapsed.

The real difficulty in the case arises upon the point of stale demand. The case of *In re Mammoth Copperopolis of Utah* (3) appears to me to shew that where the liquidator is himself in default under a winding-up, the liquidator being the person who represents the outside creditors as well as the company, it is possible for him so to act as to preclude himself from applying to

(1) 33 Ch. D. 552. (2) 9 H. L. C. 654.
(3) 50 L. J. (Ch.) 11.

this Court to assist him, even in a case where there has been a breach of trust before the winding-up. I do not wish to throw any doubt upon the suggestion that the liquidator's demand may become stale by inaction on his part; but in the present case, it seems to me, it is impossible to say upon these materials that the liquidator has been in default. No question was put to him upon the subject, and one must assume that there were reasons which justified his inaction during the years that have elapsed since the winding-up. If it was desired to put the case of default on the liquidator, he should have been given an opportunity of explaining. I myself desire to reserve for further consideration the point whether any demand made on behalf of the creditors of the company by a liquidator in the winding-up, to recover moneys of the company in the hands of directors who have wrongfully used it, and who have never been able to discharge themselves with regard to it, can, when the liquidator himself is in no default as to time, be treated as a stale demand. It is not necessary to decide that point, and I only desire to reserve it for further consideration should it ever arise.

With regard to the interest, I am unable to see how, when money has been wrongfully misappropriated by a trustee, and when it must be treated for the purposes of this Court as if it was still in his hands, the interest ought not to be recoverable as well as the principal. I do not say that there may not be circumstances which would render it unjust to give the interest as well as the principal; but, speaking as a general rule, it seems to me that the shadow must follow the substance, and I see no possibility in this case of distinguishing between the two.

For these reasons, I am of opinion that the judgment below must be affirmed; but I have come with great reluctance, as I believe my learned Brothers have, to this conclusion, because there is a semblance of hardship in the case; but the law seems to me to be too clear, and the law is based upon general principles of justice.

FRY, L.J.:—

I, too, have arrived at the conclusion that the decision of the learned Judge was correct. With regard to the articles of

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association, I am perhaps rather more inclined than my learned Brethren to think that the 119th article does require the directors to pay interest only out of profits; but that point is one which it is really not necessary to consider further, because it does not in any way come into the present case. With regard to the main question, it appears to me clear, speaking, of course, without regard to recent legislation which extends certain benefits under the *Statute of Limitations* to trustees, that where money has found its way into the hands of a trustee or other person against whom this Court gives the same relief as against a trustee, there the trustee, or the person in a fiduciary position, cannot set up the *Statute of Limitations*, or the analogy of the *Statute of Limitations*, as an answer to the demand for money which was in his hands. No case has been or can be cited inconsistent with that proposition. I am, of course, not speaking of cases of what has been called an equitable tort, but I am speaking of cases where the money has got into the hands of a trustee and he is called upon to account for it. Then, with regard to the stale demand, I, like my learned Brethren, desire to reserve the question whether that doctrine does or does not apply in respect of an act which it is entirely beyond the power of a corporation or company to confirm. Whether that can become stale, so as to preclude the company from saying it is *ultrà vires*, is a point upon which I desire to express no opinion one way or the other. But in this case I am of opinion that the demand is not stale. The action has been brought within the period of limitation; it has been brought within six years of the death of *Bennett*. Down to the time of his death, I think it must be considered that his influence as a director protected him, and up to the time of the winding-up the creditors do not seem to have known that they had any interest in any question of this description. It was unlikely that the shareholders, who themselves participated in the breach of trust, would ever move in the matter; it is unreasonable that they should. There is no loss of evidence shewn to have occurred from the lapse of time. In fact, we have before us a case in which there is no dispute as to the facts, and in the circumstances I cannot say that I think there is any rule of Courts of Equity or Courts of Law against stale demands which precludes

the Plaintiff in this case from obtaining his right against Captain *Bennett* to account for the sums which he improperly applied.

BOWEN, L.J.:—

I should like to say that I am not quite certain that I have worded my judgment as accurately as I should desire. The point I desired to reserve was as to any demand made on behalf of the creditors of the company by a liquidator in the winding-up to recover moneys of the company when the directors have wrongfully used it. I wished to indicate that I was considering the case of a demand made in respect of moneys which the company had no power to part with by the general law, and which it is therefore forbidden to part with, and which, therefore, the company parting with them had neither power to confirm nor direct.

Solicitors for Plaintiffs: *Hicklin, Washington, & Pasmore.*
Solicitors for Defendants: *Johnson, Weatherall, & Sturt.*

M. W.

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[1890 J. 158.]

Contract—Validity—Public Policy—Stifling a Prosecution—Implied Condition.

The secretary of a building society, who had made default in accounting for money paid to him and was threatened by the society with a prosecution for embezzlement, applied for assistance to the Plaintiffs, who were his relatives, and they gave a written undertaking to the society to make good the greater part of the debt due from the secretary, the expressed consideration being the forbearance of the society to sue the secretary for the amount for which the Plaintiffs made themselves responsible, and in pursuance of that undertaking they gave two promissory notes and some title deeds as collateral security to the society. The Plaintiffs in giving the undertaking were actuated by the desire to prevent the prosecution, and that was known to the directors of the society; but no promise was made that there should be no prosecution.

The society brought an action on the promissory notes in the Queen's Bench Division, and the Plaintiffs brought an action in the Chancery

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Division to set aside the promissory notes and the collateral securities on the ground that they were made for an illegal consideration. The Queen's Bench action was transferred to the Chancery Division and the two actions tried together:—

Held (affirming the decision of *Vaughan Williams*, J.), that it was an implied term of the agreement that there should be no prosecution; that the agreement was therefore founded on an illegal consideration, and void; and that the society could not recover on the promissory notes or enforce the securities; and, the society not opposing, they were ordered to be delivered up to the Plaintiffs.

THIS was an appeal from a judgment of Mr. Justice *Vaughan Williams* (1).

The facts are given at length in the previous report, and may be stated shortly as follows:—

The Plaintiffs, *Thomas Elias Jones* and *Catherine Jones*, his mother, were respectively the brother-in-law and mother-in-law of *John Cadwaladr*, deceased. The Defendants were the *Merionethshire Permanent Benefit Building Society*, which was established under the *Building Societies Act*, 1874, at *Blaenau-Festiniog, Merionethshire.*

The object of the action was to set aside two joint and several promissory notes signed by the Plaintiffs in favour of the society for £200 and £150 respectively, and certain collateral securities. *John Cadwaladr* was the secretary of the society from the time of its incorporation in 1887 until March, 1889, and it was part of his duty as secretary to keep the accounts of the society.

In February, 1889, the directors discovered that some of the money received by *Cadwaladr* on behalf of the society was unaccounted for, and on a thorough investigation it was ascertained that he was a defaulter to the amount of at least £626 2*s*.

At a meeting of the board on the 30th of March it was resolved that the solicitor of the society should be instructed to propose securities to cover the amount due from *Cadwaladr* to the society, and it was further resolved that certain securities specified in the resolution should be accepted. These securities included the following: "Mother-in-law and brother-in-law as sureties for the £400." There was no evidence as to the circumstances under which this security was proposed.

(1) [1891] 2 Ch. 587.

Cadwaladr applied through his son to the Plaintiffs to help him out of his difficulty, and after some persuasion they agreed to do so. On the 6th of April the Plaintiff *T. E. Jones* accompanied *Cadwaladr* to the office of Mr. *G. H. Ellis*, where a board meeting was being held. After some time they were called in to the meeting, and *Jones* offered, on behalf of himself and his mother, to pay to the society £176 2*s.* in cash, and to secure payment of a further sum of £350 by two promissory notes and the deposit of certain title deeds. This offer was accepted. There was a conflict of evidence as to the conversation which passed at the meeting, *Jones* asserting that he expressly referred to the possibility of a prosecution of *Cadwaladr* for embezzlement, which the Defendants' witnesses denied. The evidence on that point is specially referred to in the judgment of Lord Justice *Lindley*. It was, however, admitted that no promise was made by the directors not to prosecute *Cadwaladr*.

On the evening of the same day, certain of the directors called at *Cadwaladr's* house, accompanied by a clerk of Mr. *G. H. Ellis*, and on that occasion the Plaintiff *T. E. Jones* signed, on behalf of himself and his mother, a written undertaking which had been prepared in Mr. *Ellis's* office since the meeting of the board. It was addressed to the society, and was in the following terms:—

"In consideration of your not suing Mr. *John Cadwaladr* of &c., to recover the sum of £526 2*s.*, being part of a sum of £626 2*s.*, being the whole amount owing by him to you, we undertake to see you paid the sum of £526 2*s.* in the manner following, viz., in cash amounting to £176 2*s.*, and the remainder to be secured by two promissory notes (one for £200 and one for £150), and also interest thereon at the rate of 5 per cent. per annum, to be payable on demand and executed by us." At the same time he paid over to the directors £176 2*s.* in cash, and filled up and signed two promissory notes for the proposed amounts, and handed them to the directors. He also deposited with the directors certain deeds which he had brought with him as collateral security for the sums secured by the promissory notes.

The Plaintiffs took security from *Cadwaladr* for the sum for

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which they had made themselves responsible. On the 16th of July, 1889, *Cadwaladr* died intestate.

In January, 1890, the society brought two actions in the Queen's Bench Division against the Plaintiffs, on the two promissory notes, which were afterwards consolidated, and the consolidated action was transferred to the Chancery Division to be tried with the present action upon payment by the Plaintiffs to the society of £370, the society undertaking to repay the amount to the Plaintiffs if the Court should so order, and upon delivery by the society to the Plaintiffs of the deeds deposited with the society as collateral security.

The Plaintiffs claimed a declaration that the promissory notes and the collateral security were invalid, and that they were entitled to retain the deeds free from any charge or incumbrance; and they asked for delivery up of the notes to be cancelled and repayment of the £370 with interest.

The Defendants pleaded that the directors had no belief that *Cadwaladr* had been guilty of fraud, and that they never threatened or intended to take criminal proceedings against him.

The conclusions to which Mr. Justice *Williams* arrived on the facts proved at the trial are stated in the following passage in his judgment: "In this case I find as a fact, that *Cadwaladr* did embezzle funds intrusted to him by his employers, the building society. I find as a fact, that the directors knew of this embezzlement, and that they recognised the default of *Cadwaladr* as a default arising from his criminal use of the funds. Under these circumstances, I find that the directors did threaten to prosecute *Cadwaladr*. And I further find that these threats which were so uttered to *Cadwaladr* were communicated by Mr. *G. H. Ellis* to Mrs. *Williams* and also to young *Cadwaladr*; but I find that the directors had no communication whatsoever with the Plaintiffs—that is to say, with Mr. *Elias Jones* or Mrs. *Jones*—in which they mentioned any threats of prosecution of *Cadwaladr*, and I also find that at the only interview which seems to have taken place between the directors and Mr. *Elias Jones* (they do not seem to have had any interview, as far as I can make out, with Mrs. *Jones*), not only was there nothing said by the directors on the subject of the prosecution of *Cadwaladr*, but also

there was no promise in words by the directors that they would not prosecute *Cadwaladr*. It is because I take this view of the facts that I spoke of the Plaintiffs as volunteers, and I still speak of them as volunteers. I find that *Cadwaladr*, fearing prosecution, applied to his relations. I have no doubt whatever that *Cadwaladr* mentioned to his relations the fact that if he did not get this money the directors intended to prosecute him; and I have very little doubt that the form of the agreement was to a certain extent affected by this fact, that the Plaintiffs knew that there was every prospect of prosecution of *Cadwaladr* if he did not provide the money. I mean this, that I think the Plaintiffs, at all events, were anxious, or Mr. *Elias Jones* was anxious, that the agreement should be put in such a form as would render it as little likely that *Cadwaladr* should be sued, as well might be; and under these circumstances Mr. *Ellis* or his clerk seemed to have recognised that the relations might reasonably wish to have the agreement in such a form as would render a prosecution as unlikely as might be; and, therefore, they had the agreement drawn up in such a shape that it put an end, according to my view, to the indebtedness of *Cadwaladr* altogether for the amounts in respect of which Mrs. *Jones* and *Elias Jones* took the responsibility on their shoulders."

His Lordship accordingly gave judgment for the Plaintiffs.

The Defendants appealed from this judgment.

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Reid, Q.C., *Haldane*, Q.C., and *W. D. Rawlins*, for the Appellants:—

The judgment is based upon the finding of the learned Judge that the directors threatened to prosecute *Cadwaladr*. But there is no evidence to support that finding. The evidence rather shews that the directors did not think that there had been anything criminal in his conduct, but believed that the deficiency arose from his carelessness in keeping the accounts and his want of attention to his business. It may be that *Cadwaladr* himself was afraid of a prosecution and that his relations the Plaintiffs were also afraid; but there is no evidence that the directors ever contemplated a prosecution, and certainly they never made

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any threats to him. Nor is there any evidence of any bargain being made with him or his relations, or any promise being made that they would not prosecute. There is nothing illegal in a person who is injured by another accepting reparation from him or his friends if he does not make a bargain with him to refrain from prosecuting: *Ward* v. *Lloyd* (1); *Flower* v. *Sadler* (2). There is no proof of pressure or undue influence in this case, and even if the consideration was illegal the Plaintiffs were *participes criminis*, and cannot take advantage of their own wrong: *Taylor* v. *Chester* (3). However, if the Court should hold that the agreement was void and that the Defendants could not recover on the promissory notes, we do not wish to resist the Plaintiffs' claim to have them delivered up.

Jelf, Q.C., and *H. Terrell*, for the Plaintiffs:—

It is not to be expected in such cases as the present that the agreement to stifle a prosecution should be expressed in writing. The existence of the corrupt bargain may be inferred from the circumstances. The evidence shews that the directors did in fact threaten to prosecute *Cadwaladr*, and that they communicated their threat, if not to him, to his relations. It is absurd to suppose that they did not believe that he had embezzled the money, and the Plaintiffs well knew that he was in danger of a prosecution. The directors knew that the Plaintiffs were acting from fear of a prosecution, and as they accepted the security with that knowledge it was an implied term in the agreement that they should not prosecute: *Egerton* v. *Earl Brownlow* (4); *Williams* v. *Bayley* (5).

There is no need to prove pressure or undue influence in this case, as the proceedings were commenced by the society. The Plaintiffs are really on the defensive, and the action in the Chancery Division is in aid of their defence in the Queen's Bench actions.

Reid, in reply.

(1) 6 Man. & G. 785; 7 Scott, N. R. 499.
(2) 10 Q. B. D. 572.
(3) Law Rep. 4 Q. B. 309.
(4) 4 H. L. C. 1.
(5) Law Rep. 1 H. L. 200.

1891. Dec. 5. LINDLEY, L.J.:—

This is an appeal from the judgment of Mr. Justice *Vaughan Williams*, which will be found reported in [1891] 2 Ch. 587, where all the details of the case are set out.

The case comes before us in rather a curious shape, inasmuch as there are three actions which are now being tried together. There were two actions at law to enforce payment of certain promissory notes. There is also an action in the Chancery Division to have them, and certain securities which were given by the makers of them, delivered up to be cancelled. Those two actions in the Queen's Bench Division were directed to be transferred to and come on together in the Chancery Division, and an order, which I will read, was made. It was an order of the 21st of February, 1890, on the application of the Plaintiffs in this action—that is, the Chancery action: "The Plaintiffs and Defendants, by their respective counsel, consenting to take all necessary steps to obtain the transfer of the actions of the *Merionethshire Permanent Benefit Building Society* v. *Jones*, which actions were consolidated, and which consolidated action is now pending in the Queen's Bench Division of this Court, and that such action when so transferred should be tried with this action, and the directors of the Defendant company, by their counsel undertaking to repay to the Plaintiffs the £370 hereinafter mentioned, or such part thereof as this Court may think fit with interest, in the event of the Plaintiffs succeeding in this action, or if this Court shall so order—This Court doth order that the Plaintiffs *Thomas Elias Jones* and *Catherine Jones* (widow) do pay to the Defendants, the *Merionethshire Permanent Benefit Building Society*, the sum of £370"—that is, the amount due on the notes—"and that thereupon the Defendants, the *Merionethshire Permanent Benefit Building Society*, deliver up to the Plaintiffs, *Thomas Elias Jones* and *Catherine Jones* (widow), the deeds and documents mentioned in the exhibits referred to in the affidavit of the Plaintiff, *T. E. Jones*, and it is ordered that the costs of this motion be reserved." Under these circumstances, the case came before Mr. Justice *Vaughan Williams*, and he has decided that the notes in question are invalid, and that these securities ought to be retained by the Plaintiffs who gave them, and who

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have got them under the order to which I have referred. The substantial question under these circumstances is whether the learned Judge was right in holding that these notes were invalid at law and could not be enforced. The alleged ground of illegality was, that they were given pursuant to an agreement to stifle a prosecution, to put it shortly. Now the facts, as I say, are stated in the report, and I shall content myself for the moment with reading the finding of Mr. Justice *Vaughan Williams* without going through the details, and commenting only upon the one finding which is quarrelled with by the Appellants. Mr. Justice *Vaughan Williams* begins his judgment in this way:—[His Lordship read the passage in Mr. Justice *Vaughan Williams's* judgment, given above, and continued:—]

Now, the learned counsel for the Appellants, who argued the case with great skill and great clearness, did not quarrel with any of these findings of fact except one, which is as follows: "I find that the directors did threaten to prosecute *Cadwaladr*." We have looked into the evidence on that point, and a great deal must turn upon the view the learned Judge took of the truth of what I am going to read from the answers of the Plaintiffs to the 4th interrogatory. The 4th answer runs thus: "We did not either of us previously to the payment and giving on deposit of £176, promissory notes, and deeds and documents referred to in paragraphs 6 and 7 of the statement of claim, or on the occasion of such payment and giving on deposit, make any inquiry of any of the directors or officers of the Defendant society in reference to the prosecution of or taking of any criminal proceedings against the said *John Cadwaladr* by the Defendant society or its directors; but I, the said *Thomas Elias Jones*, on that occasion"—that is, the 6th of April, 1889—"referred to a prosecution which had some time before been instituted by the directors of a neighbouring building society against their secretary for similar malpractices to those charged against the said *John Cadwaladr*, and on which prosecution such secretary was convicted, and, referring to such prosecution, I said, that if the directors of such building society had had such an offer as I am making they would have jumped at it rather than punish their secretary, 'and if you'—meaning the directors—'send *Cadwaladr* to prison, you

will get nothing in that way.' No one made any reply to such observation. I believe all the directors were present on that occasion." Now that is denied, and a great deal turns upon the view taken by the learned Judge of the truth of that statement, and, having looked at the notes, I have come to the conclusion—I think we all have come to the conclusion—that we must believe that that was true. If that is true, then the only point on his finding which is quarrelled with stands unimpeached, and I take the facts, therefore, as correctly found by him in all respects. Upon that basis it is necessary to consider what the true result ought to be.

In order to clear the ground, I think it is desirable to refer to the different kinds of proof which have to be given according as the case arises in a Court of law or in a Court of Equity. In the action at law upon the notes the Defendants are entitled to plead the illegality of the transaction, and, if they can prove it, to obtain judgment. They are not seeking active relief; but although the illegality does not appear upon the face of the instrument, it is familiar law that a person can defend himself by pleading illegality. Now what must he shew at law in order to protect himself from paying the notes which he has given? The law as to that was very correctly stated as long ago as a case in *Campbell* by Lord *Ellenborough*, and although it is a *nisi prius* case it is one of those which is so correctly reported by Lord *Campbell* that I have no hesitation in citing it. The statement I refer to will be found in *Wallace* v. *Hardacre* (1). Lord *Ellenborough* said this: "It was common enough, upon discovering that bank notes or bills of exchange had been forged, to send them back to the persons from whom they had been received, and to get others that were valid in their stead. But it would be too much to say, that the consideration for these last was corrupt and illegal, and that they could not be rendered available in the hands of those whose object in getting possession of them was merely to exchange securities that were forged for others without this vice. If any bargaining could be shewn here to stifle a prosecution for a criminal act, the action certainly could not be maintained; but otherwise, the mere substitution would not

(1) 1 Camp. 45, 46.

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invalidate the plaintiff's right to recover against the acceptor of this bill." From that case, which was decided in the year 1807, down to the present time, so far as I know, the decisions are all uniform, that in order to amount to a defence on the ground of illegality there must be an agreement not to prosecute —an agreement, as it is called, to stifle a prosecution. Before I apply that observation to this case, I proceed to consider what has to be done in a Court of Equity. A plaintiff is not entitled to relief in a Court of Equity on the ground of the illegality of his own conduct. In order to obtain relief in Equity he must prove not only that the transaction is illegal, but something more: he must prove either pressure or undue influence. If all that he proves is an illegal agreement he is not entitled to relief. If, on the other hand, he can go further and shew pressure or undue influence, so as to bring himself within the doctrine applicable to transactions of that kind, then he is entitled to relief in equity, although the transaction may be illegal upon the ground that it is meant to stifle a prosecution. That that is so is shewn by the cases of *Osbaldiston* v. *Simpson* (1) and by *Williams* v. *Bayley* (2), where the ground of relief which was obtained in Equity was distinctly pressure and threats.

Now, in this case of *Jones* v. *Merionethshire Permanent Benefit Building Society* there is no proof, scarcely a trace of evidence, of pressure or undue influence. The learned Judge has not found any, and we cannot find it. Therefore, if it had not been for the order of February, to which I have referred, I should have thought the Plaintiffs in Equity had failed; but that is not the substantial question now. The substantial question is whether, under the facts which have been found, the learned Judge was warranted in coming to the conclusion that there was an agreement not to prosecute. Upon this point I think he was right. I think upon the finding which I have read it is impossible to avoid coming to the conclusion, not only that these promissory notes and other securities were given by the relatives in the expectation that *Cadwaladr* would not be prosecuted—that alone would not be sufficient, as was decided by the case which was referred to of *Ward* v. *Lloyd* (3)—but, having

(1) 13 Sim. 513. (2) Law Rep. 1 H. L. 200. (3) 6 Man. & G. 785.

regard to those findings, I cannot myself avoid inferring as a fact that they were given for the express purpose of preventing a prosecution of *Cadwaladr*, that that purpose was perfectly well known to the directors, and that the whole negotiation proceeded upon that basis. In other words, I cannot avoid coming to the conclusion that there was an implied term or condition that they should not prosecute, and that they accepted these notes knowing of such term or condition, and without dissenting or intimating in any way whatever that they took the notes upon any other condition or upon any other terms. It appears to me, therefore, that upon that view of the case it is impossible to disturb the judgment of the learned Judge, and that this appeal must be dismissed.

BOWEN, L.J.:—

This case appears to me to be one not free from difficulty, the difficulty arising out of the facts which were proved at the trial and not from the law, about which I do not suppose very much doubt can be entertained. The cases may be ranged under two heads: first of all, the cases where there is the suggestion of an agreement to stifle, as it is called, a prosecution; and secondly, the cases where there has been that which amounts to pressure or undue influence within the meaning attached to those terms by a Court of Equity. First of all, with regard to agreements to stifle prosecutions. The duty to prosecute, or not to prosecute, is a social and not a legal duty, which depends on the circumstances of each case. It cannot be said that it is a moral duty to prosecute in all cases. The matter depends on considerations, which vary according to each case. But the person who has to act is bound morally to be influenced by no indirect motive. He is morally bound to bring a fair and honest mind to the consideration and to exercise his decision from a sense of duty to himself and others.

What is it that the law requires about the exercise of this moral duty? It is that it shall not be made a matter of private bargain. "It is to the interest of the public," says Chief Justice *Erle*, in the case of *Clubb* v. *Hutson* (1), "that the suppression of

(1) 18 C. B. (N.S.) 414, 417.

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a prosecution should not be made matter of private bargain." It may be made the matter of private bargain in two ways: first of all, if forbearance to prosecute is promised on condition of the receipt of a particular sum of money or a particular security; secondly, if the forbearance is given in consideration of money or security actually received. The second class of cases is a class in which there is a private bargain, because the security or the money is taken upon the terms that it shall be retained if the forbearance is given. Both these classes of cases fall within the rule of Chief Justice *Erle*—a rule which is much older than Chief Justice *Erle*, but which is tersely put in the case which I have mentioned. The difficulty in practice arises when reparation has been made by the offender. I put aside the somewhat limited branch of instances in which the personal interest of the injured party is really alone the matter in question, such as assaults not of an aggravated character, or possibly private slanders or libels. I will not now consider the limitation which ought to be placed upon contracts or agreements made in that limited branch of cases; but I will deal generally with wrongs committed against the public as well as against the individual. It is not possible to deny that embezzlement, like false pretences, is a crime committed against the public as well as against the individual, and, in deciding what steps should be taken to punish it, the person who has to deal with the case must, if he is to discharge his moral duty, conscientiously consider the public as well as himself. But still the subject of reparation does seem to me to be one which may fairly be taken into the consideration of the case. First of all, reparation is a duty which the offender owes quite independently of his fear of prosecution or otherwise, and it would be absurd to my mind to lay down as an impossible counsel of perfection that the relative of an offender and his friends are not justified, nay, even are not bound, in certain instances, to assist him to make reparation to those whom he has injured.

It is impossible, therefore, to say that reparation is a thing which ought not to be made, as it is also impossible to say it is a matter which is not likely to affect the mind, and, to a certain extent, reasonably to affect the mind, of a person who has been

wronged. I agree with what Mr. *Reid* said, that the law certainly is not anxious to discourage reparation. But you must come back after reparation made to the one dominant test in each case. It is a circumstance which may be lawfully taken into consideration that the offender has done his best himself, or with the assistance of his friends, to make good his wrong. But the test is, what is the moral duty of the person who has been injured to himself and others? He must make no bargain about that. If reparation takes the form of a bargain then, to my mind, the bargain is one which the Court will not enforce.

Now, in the cases of *Jones* v. *Merionethshire Permanent Benefit Building Society* and *Merionethshire Permanent Benefit Building Society* v. *Jones*, Mr. Justice *Vaughan Williams* has seen all the parties. He has considered the case very carefully, and we have considered it very carefully. My learned Brethren have consulted Mr. Justice *Vaughan Williams*, and have found that he formed and entertained the opinion which we thought he entertained upon reading his judgment, namely, that the version of the story told by the Plaintiffs in Equity was substantially the true one, that threats of a prosecution were made in substance, and that the fear of that prosecution was known to be the dominant influence that was affecting those who gave the securities. It is impossible, I think, under those circumstances, and considering that Mr. Justice *Vaughan Williams* has seen all the parties, not to come to the conclusion that his judgment cannot be disturbed. There was either an implied promise not to prosecute, which is the view Mr. Justice *Vaughan Williams* has taken, or, at all events, these notes were given on the terms that they should be kept and used if the prosecution did not take place. The prosecution did not take place, and it is sought to enforce these notes. The consideration of the notes was the corrupt bargain to stifle the prosecution. I use the term corrupt in the sense that it is a bargain which public policy forbids the Court to give effect to. It is not a question of recovering back money paid. There might be a difficulty in recovering back money paid on account of the well-known ground which is shortly expressed in the maxim, *Melior est conditio defendentis.* These notes are given and sought to be enforced by this agreement.

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They cannot be enforced because the notes were given in pursuance of the private bargain, which the law will not permit.

Then there is another head under which this class of case might be suggested to fall, and that is pressure or undue influence. I am not myself satisfied that if the learned Judge was right, as we must take him to be, in his view, that there was an agreement not to prosecute, that it would not properly follow as an inference of fact that there was undue influence and pressure, and undue influence and pressure exercised by the directors upon the delinquent and upon his friends, who were the Defendants in the Common Law action. It is not necessary for me to express an opinion, because the case is covered by the decision upon the first point. I abstain from expressing a final opinion upon that; but it must not be taken that I myself am convinced that there was an absence of pressure (assuming the learned Judge's view of the facts to be the correct one), and pressure, as is obvious, which in Equity would entitle the person who was aggrieved to relief.

FRY, L.J.:—

There appear to me to be two questions for decision in this case. The one is whether there was any agreement not to prosecute, and the other is whether there was any pressure.

Now, first, was there any agreement here not to prosecute? I confess during the course of the argument my mind wavered a good deal whether there was any evidence of such an agreement, and the case seemed to me to turn very much indeed upon whether or no the statement of *Thomas Elias Jones*, which he made in his answer to interrogatories, which was somewhat curiously put by the building company into the case before the learned Judge, and was repeated by *Jones* in his evidence in the box, but was denied by the directors who were called, was or was not true. If it was true, it is evident the two alternatives were placed before the minds of all the persons who were discussing the arrangement in that room, because, according to his account, somebody referred to the prosecution of the secretary of a neighbouring building society, and he spoke of the directors in that case jumping at the security rather than punishing their

secretary. There were two alternatives, taking the money or pursuing the prosecution, plainly before them there; and he says that he then added that if they sent *Cadwaladr* to prison they would get nothing; which applies to the two alternatives in this particular case. There was a great deal of discussion before us as to whether the learned Judge did or did not believe that statement. I have thought it right to ascertain from himself whether he did or not believe that statement. He says that he considered the statement of *Thomas Elias Jones* to be substantially true. That being so, it appears to me that there was evidence before the learned Judge, accepted by him as true, upon which he had reasonably concluded that there was a bargain between the two parties to pursue in this case the course which had been pursued by the adjoining building society, to take the money upon the terms of not prosecuting. It is not for me to throw any doubt on that evidence. I think, therefore, it is impossible to differ from the opinion of the learned Judge upon that part of the case.

Then, was there pressure? Was there that pressure which enabled the *Joneses* to come forward in their character of oppressed parties to sue the building society as oppressors in the Court of Equity? The learned Judge has not found that there was such pressure, and for my own part I cannot find any reason to quarrel with his conclusion. The result of that would be, of course, the dismissal of the proceedings in Equity; but, as already observed by Lord Justice *Lindley*, there has been an agreement embodied in the order to which he has referred by which the counsel for the building society appear to feel themselves bound to this extent, that they would not raise any question about the custody of the notes. Attention being drawn to it, they declined to argue it. That being so, it appears to me we cannot act upon the strict rights in this case, and that the order indicated by Lord Justice *Lindley* is the right one to make.

LINDLEY, L.J.:—

As regards the costs, it is very unusual for this Court to dismiss an unsuccessful appeal without costs; but there are grounds here which induce us to do it. The grounds are these: but for the order of February, to which I have referred, that Chancery action

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ought to have been dismissed with costs. That order, having regard to the terms of it, we have passed over, and the order of the Judge stands in the Chancery action. We are very much struck with the character of the defence and the circumstances under which it was raised. It is an extremely discreditable defence, to which we are compelled to give effect upon grounds of public policy. Upon these grounds, therefore, the appeal will be dismissed without costs.

BOWEN, L.J., and FRY, L.J., concurred.

Solicitors: *Indermaur & Brown*, agents for *J. T. Roberts, Carnarvon; Robbins, Billing & Co.*, agents for *George Henry Ellis, Bluenau-Festiniog.*

M W.

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May 8, 12; *July* 8
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[1882 W. 347.]

Mortgage—Chose in Action—Priority—Notice to one of several Trustees—Inquiry of Trustees—Death of only Trustee who has Notice.

S., one of the two trustees of a will, knew of the execution of a marriage settlement by which the share of a woman in a personal fund held on the trusts of the will was settled. *E.*, the other trustee, had no notice of it. Afterwards the husband and wife proposed to mortgage this share, not disclosing the settlement. The intending mortgagees inquired of *S.* and *E.* about incumbrances. *S.* returned an evasive answer. *E.* replied that he was not aware of any dealing with the share. The mortgagees, without making further inquiry of *S.*, advanced their money and gave formal notice of their security both to *S.* and *E.* *S.* died, and *F.* was appointed trustee in his room. *E.* and *F.* having obtained judgment for the execution of the trusts of the will, the trustees of the settlement claimed to have the share paid to them free from the mortgage:—

Held (affirming the decision of *Stirling*, J.), that the trustees of the settlement were entitled to the share in priority to the mortgagees; for as at the time when the mortgagees took their security there was a trustee who had notice of the settlement, and from whom the mortgagees might have acquired knowledge of it, the settlement, according to the authorities, had during the life of that trustee priority over the mortgage, and this priority could not be lost by the death of the trustee, all other circumstances remaining the same.

MATTHEW COTES WYATT died in 1862, leaving a will dated the 31st of May, 1847, by which he gave his leasehold,

freehold, and copyhold estates and his personal estate to *Sharp*, *Bradley*, and *Ellis*, their executors, administrators, and assigns, upon trusts which the Court held to amount to a trust for conversion, though the will, which was a long and complicated one, was so framed as to give some colour to the argument that only a discretionary power of selling the leaseholds was given. The testator directed his trustees to pay the income of four thirtieth parts of his residuary estate to his son, Sir *Matthew Wyatt*, for life, and after his death two of these thirtieth shares were to be divided between the three reputed children of Sir *Matthew Wyatt*, of whom *Mary Wyatt* was one. The property was nearly all leasehold.

The will was proved by *Sharp* and *Ellis*.

On the 16th of July, 1864, *Mary Wyatt* married Major *T. H. Duncombe*. On her marriage a settlement of her share and interest in the testator's estate was executed. *Sharp*, who was a brother-in-law and intimate friend of the lady's father, in June, 1864, called upon a personal friend of his own, who was a member of the Chancery Bar, and gave him verbal instructions to prepare the settlement, which he did; and *Sharp* afterwards himself called for and took away the draft and had it ingrossed. It was executed by *Mary Wyatt*, *Duncombe*, Sir *M. Wyatt*, and by *Frederick Wyatt*, who was then the only trustee, a blank for the name of a second trustee not having been filled up, though a second trustee was subsequently appointed. No notice of the settlement was given to *Ellis*. It did not appear what further part *Sharp* took as to the settlement; but after the marriage, in conversation with Mrs. *Duncombe*, according to an affidavit made by her, he spoke of the execution of the settlement as having been a judicious act on the part of her father.

On the 27th of October, 1875, Mr. and Mrs. *Duncombe* mortgaged her interest under the will to Messrs. *Ward, Mason, & Pemberton*, to secure £300 and interest. On this occasion Mr. and Mrs. *Duncombe* made a statutory declaration that they had never assigned, settled, nor agreed to settle, mortgaged, charged, or otherwise incumbered, Mrs. *Duncombe's* interest under her grandfather's will. The mortgage was registered in the *Middlesex*

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Registry. Prior to the advance, the mortgagees' solicitor wrote to *Sharp* and *Ellis*, asking for information on various points, and (*inter alia*) whether they respectively had notice of any mortgage charge or incumbrance. *Ellis* wrote back that he had no notice of any charge or incumbrance. *Sharp*, on the 12th of October, 1875, replied: "I beg to acknowledge the receipt of your letter, dated the 7th of October, 1875, and in reply can only refer you to the will of the late *Matthew Cotes Wyatt*." The mortgage transaction was completed without further communication with *Sharp*, and on its completion formal notice was given to each of the trustees of the will. *Ellis* acknowledged the receipt of the notice to him. *Sharp* returned no answer.

On the 22nd of February, 1876, the same mortgagees advanced to Mr. and Mrs. *Duncombe* £200, on the security of a further charge on her interest. Prior to this advance, the mortgagees' solicitor again wrote to make inquiries of the trustees of the will as to incumbrances. *Ellis* wrote that he had not received any notice of any incumbrance. *Sharp* returned no answer. Formal notice of the further charge was given to each of the trustees, and *Ellis* signed a memorandum acknowledging the receipt of the notice. *Sharp* wrote back: "I have to acknowledge the receipt of your letter of the 22nd inst. I inclose the two documents which accompanied that letter, and must refer you to the will of the late *M. C. Wyatt*, Esq."

On the 25th of August, 1876, Mr. and Mrs. *Duncombe* assigned the equity of redemption in the share to *J. C. Pawle* absolutely, of which notice was duly given. No information had been obtained from *Sharp* as to incumbrances.

On the 28th of August, 1878, *Sharp* died, leaving *Ellis* surviving, and in 1881 *Thomas Evitt* was appointed a trustee of the will in the place of *Sharp*.

On the 8th of July, 1882, a judgment was given in the present action for the administration of the trusts of the will of *M. C. Wyatt*.

On the 2nd of July, 1885, the marriage of Mr. and Mrs. *Duncombe* was dissolved on the petition of Mrs. *Duncombe*. There were five children of the marriage, who acquired vested interests under the settlement.

On the 19th of July, 1886, Sir *Matthew Wyatt* died.

On the 20th of November, 1888, an order was made by the Divorce Court extinguishing all Mr. *Duncombe's* interest under the settlement as if he was dead. Shortly afterwards Mrs. *Duncombe* married Mr. *Harley*.

On the 3rd of June, 1889, an inquiry was directed whether there were any and what incumbrances on Mrs. *Harley's* share and interest under the will, and for what amounts, and who were the persons now entitled to the said share and interest.

On the 20th of February, 1891, the Chief Clerk certified as incumbrances the mortgage of the 26th of October, 1875, and the further charge of the 22nd of February, 1876, and certified as an assignment the deed of the 25th of August, 1876. He disallowed the claims of the trustees of the settlement.

The trustees took out a summons to vary this certificate, and the hearing of it was adjourned into Court. The summons came on for hearing before Mr. Justice *Stirling* on the 8th of May, 1891.

Hastings, Q.C., and *S. B. L. Druce*, for the trustees of the settlement:—

It is quite clear that *Sharp* had notice of the settlement, he having taken an active part in the preparation of the draft and being well aware of the object of it. The notice thus acquired by him was sufficient to give priority to the trustees of the settlement, and the certificate ought to be varied accordingly: *Browne* v. *Savage* (1); *Willes* v. *Greenhill* (2); *Meux* v. *Bell* (3); *Ex parte Boulton* (4).

Rigby, Q.C., and *E. S. Ford*, for the mortgagees:—

First, we say that upon the construction of the will this is an interest affecting land. If so, we get priority by registration, without reference to any question as to notice. Secondly, there are no grounds for determining that *H. L. Sharp* had effective notice of the settlement. But, supposing we are wrong as to that, in the events which happened, we say that notice to *Sharp*,

(1) 4 Drew. 635.
(2) 29 Beav. 376; 4 D. F. & J. 147.
(3) 1 Hare, 73.
(4) 1 De G. & J. 163, 179.

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as one of the trustees, was only effectual to preserve priority during his lifetime, and upon his death our priority was secured.

First, as to the will, we say that there is no conversion of the leaseholds, but only a power to sell them if it should be found desirable. Our incumbrance, therefore, is an incumbrance on an estate in land, and we are entitled to priority by our registration in *Middlesex*: 7 Anne, c. 20, s. 1; *Arden* v. *Arden* (1), explaining *Malcolm* v. *Charlesworth* (2). There a legacy was given payable out of land; and in *Arden* v. *Arden* the same doctrine was applied, although there was a direct trust for sale.

Next, we say, upon the evidence, that knowledge of the execution of the settlement is not brought home to *Sharp*. The evidence only goes to shew that he was aware of the preparation of the settlement; that is not enough to prove that he had notice of its execution.

Then, as to the notice to him being notice to all the trustees, the principle is laid down in *Dearle* v. *Hall* (3), as explained in *Foster* v. *Cockerell* (4).

The true ground of the doctrine is that an equitable assignment without notice to the trustees is not a complete assignment; that is to say, that notice to the trustees is an essential part of the assignment itself when its validity is assailed by any other than the assignor. The cases refer to other principles, such as negligence, as the ground for the rule. But that is not the ground. The true ground is that notice is necessary to complete the title. There can be no negligence if there is no duty. In the case of an equitable assignment the only duty the assignee owes is to himself. He owes no duty to any one else. So that these cases cannot be founded on the neglect of duty of the first or subsequent assignees. In *Dearle* v. *Hall* the first assignee had been diligent; but in *Foster* v. *Cockerell* he had done nothing.

It may be a matter of prudence for the assignee to give notice, but the only duty is owed to himself. The question is how to complete the assignment. If the property is vested in a trustee,

(1) 20 Ch. D. 702.
(2) 1 Keen, 63.
(3) 3 Russ. 1.
(4) 3 Cl. & F. 456.

you must affect his conscience, and in no other way than by giving him notice can it be done. In every case the question is, for whom is he trustee? You must affect his conscience and make him a trustee for you. All the cases concur in this. If you bring notice home to one trustee, that is enough during his lifetime to protect you. It is of no use to make one trustee trustee for yourself if his co-trustee is trustee for some one else. If there is notice to one trustee only, and he dies without passing it on, then the question arises, who is the survivor trustee for? You cannot make yourself absolutely safe by giving notice to all the trustees, because all may die and new trustees may be appointed; then the first incumbrancer who gives notice to the new trustees obtains priority: *Phipps* v. *Lovegrove* (1). Notice to one trustee affects him only. Assuming that *Sharp* had notice of the settlement, it may be that he was converted into a trustee for the parties claiming under it; but that notice was not carried on, and upon his death the only trustee was *Ellis*, who had notice of our incumbrance, and was, therefore, trustee for us.

In *Arden* v. *Arden* (2), Mr. Justice *Kay* gives completion of title as the foundation of the rule.

That the doctrine does not depend upon negligence is shewn by the fact that an assignee of an equitable *chose in action* who does not give notice is protected if the trustee gets notice *aliunde*: *Lloyd* v. *Banks* (3).

At the time of *Sharp's* death, *Ellis* was trustee for us, and he not having had notice of the settlement, we are entitled to priority.

[They also referred to *Smith* v. *Smith* (4); *Miles* v. *New Zealand Alford Estate Company* (5); *Meux* v. *Bell* (6); *Browne* v. *Savage* (7); *Buller* v. *Plunkett* (8); *In re Hall* (9); *Timson* v. *Ramsbottom* (10); *Société Générale de Paris* v. *Tramways Union Company* (11).

(1) Law Rep. 16 Eq. 80.
(2) 29 Ch. D. 708.
(3) Law Rep. 3 Ch. 488.
(4) 2 C. & M. 231.
(5) 32 Ch. D. 266.
(6) 1 Hare, 73.
(7) 4 Drew. 635.
(8) 1 J. & H. 441.
(9) 7 L. R. Ir. 180.
(10) 2 Keen, 35.
(11) 14 Q. B. D. 424.

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Jason Smith, for the assignees of the equity of redemption :—

It is the duty of an assignee to give notice: *Foster* v. *Cockerell* (1); *Ex parte Boulton* (2); *Sugden* on Vendors and Purchasers (3); *Lloyd* v. *Banks* (4). There was no notice of the settlement, and we are entitled to priority over it. Moreover, we say that this is land, and we are prior in point of registration.

Again, the trustees have stood by and never raised this point until now. They and the lady have allowed us to keep down the interest upon the prior incumbrance. They are not entitled to assert any equity against us.

Spence, for the trustees of the will.

Hastings, in reply :—

There is a trust for sale which affects a conversion, though there is a wide power of postponing the sale. The *Registration Act*, therefore, does not apply, and registrations are useless.

Then, as to the second point, it is quite clear that *Sharp* had notice. He told the mortgagees as plainly as he could that he had notice, and would not say anything about it. His object, no doubt, was to protect Mrs. *Duncombe*. There was no fraud by him upon the mortgagees, though no doubt the husband intended to cheat them.

The third point, as to notice, has never been raised before. It is said that the foundation of the doctrine is completion of the assignment, and that if there is only notice to one trustee and he dies then the completion drops. That is a mistaken view. In all the earlier cases it was supposed that it was not necessary to give notice at all: *Meux* v. *Bell* (5); *Wright* v. *Lord Dorchester* (6). Notice is not required to complete the assignment as between assignor and assignee. All the cases must be read as between subsequent incumbrancers.

We contend that priority is effective once and for all. Mis-

(1) 3 Cl. & F. 456.
(2) 1 De G. & J. 176.
(3) 13th Ed. c. 10, s. 1, par. 43, p. 314.
(4) Law Rep. 3 Ch. 488.
(5) 1 Hare, 73.
(6) 3 Russ. 49, n.

apprehension has arisen from the language of the Judges when dealing with cases as between incumbrancers: *Timson* v. *Ramsbottom* (1).

In *Greening* v. *Beckford* (2) the question was one of priority of date simply, and no question of notice arose. If the contention of the mortgagees is right, then all the discussion in *Timson* v. *Ramsbottom* was useless. That case was commented on in *Meux* v. *Bell* (3).

Priority is determined once for all. If there is a trustee who has notice of an incumbrance, a subsequent incumbrancer cannot obtain priority by reason of the death of the trustee who had notice of the first. *Buller* v. *Plunkett* (4) only decided that priority is not to be obtained by giving notice to some one who had not control of the property.

In re Hall, the case in the Irish Reports (5), does not go beyond *Timson* v. *Ramsbottom*.

The trustees are the first claimants on the fund.

1891. July 8. STIRLING, J. (stated the facts, and continued):—

Under these circumstances various questions arise. The first is whether the interests taken by the beneficiaries in these leaseholds under the will of *Matthew Cotes Wyatt* are to be treated as governed by the law relating to equitable interests in land (which extends to equitable interests in chattels real: *Wiltshire* v. *Rabbits* (6)), or by that which relates to *choses in action* (which extends to an interest in the proceeds of real estate directed to be converted: *Foster* v. *Cockerell* (7) and *Lee* v. *Howlett* (8)). In my opinion, the leaseholds are given to the trustees upon a primary trust for sale, and although the period of sale is left to the discretion of the trustees, and they are entitled to a share of the rents and profits so long as the leaseholds remain unsold, still the *corpus* of the property could never, as it seems to me, come to the beneficiaries as land; they could only obtain possession of it through the medium of a sale. I

(1) 2 Keen, 35.
(2) 5 Sim. 195.
(3) 1 Hare, 88.
(4) 1 J. & H. 441.
(5) 7 L. R. Ir. 180.
(6) 14 Sim. 76.
(7) 3 Cl. & F. 456, 476.
(8) 2 K. & J. 531.

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think, therefore, that the principle of *Foster* v. *Cockerell* (1) and *Lee* v. *Howlett* (2) applies.

The next question is whether *Sharp* had effective notice of the settlement. It is said that the only evidence of knowledge on his part of the execution of the settlement is the statement of Mrs. *Harley*, and, as regards the preparation of it, it is suggested that he may have been a mere go-between carrying written instructions from Sir *Matthew Wyatt* to the draftsman, and have thought it no business of his to see the draft. I am unable to accede to this view. The fair inference from the evidence appears to be that Mr. *Sharp* took an active part in procuring the preparation of the draft and knew quite well the object of it. Although I think that little reliance ought to be placed on the evidence of Mrs. *Harley* (who appears to have been party to a gross fraud), I cannot think that Mr. *Sharp*, the brother-in-law and trusted friend of Sir *Matthew Wyatt* can have been ignorant of the execution of a deed in the preparation of which he took so material a part. In my opinion, therefore, the proper conclusion of fact is that Mr. *Sharp* had such knowledge of the settlement as to bring the case within the principle laid down in *Lloyd* v. *Banks* (3).

The third question is whether the notice thus acquired by Mr. *Sharp* is sufficient to give the trustees of the settlement priority over the subsequent incumbrancers and assignee.

In *Smith* v. *Smith* (4), the plaintiff, in course of conversation with Mr. *John Smith*, one of three trustees of a fund, communicated to him the fact that he had taken an assignment of an equitable interest in the fund. No notice was given to the other two trustees; but it was held that the notice thus given to Mr. *John Smith* gave the plaintiff priority over the assignees in bankruptcy of the plaintiff's assignor. Lord *Lyndhurst*, who was then Lord Chief Baron, says: "A second assignee, in order to have obtained a priority over the plaintiff, must have shewn that he had exercised proper caution in taking the assignment; that he had applied to the trustees to know if any previous assignment had been made; and, unless he applied for this purpose to

(1) 3 Cl. & F. 456.
(2) 2 K. & J. 531.
(3) Law Rep. 3 Ch. 488.
(4) 2 C. & M. 231, 233.

each of the trustees, he would not have exercised due caution, or done all that he ought to have done. But, if he applied to each of the trustees, he would have been informed by one of them, Mr. *J. Smith*, of the previous assignment to the plaintiff, and he must then have taken the property, if at all, subject to the claim of the plaintiff."

In *Willes* v. *Greenhill* (1), the question arose between successive incumbrancers. The head-note is in these terms: "The husband of a legatee beneficially entitled under a will to a share of the testator's residuary estate was one of the trustees of the will and joined with his wife in mortgaging her share. The mortgagee served notice of the deed upon the mortgagor-trustee, but gave no other notice of the incumbrance:—*Held*, that the notice was sufficient as against subsequent incumbrancers, although the latter had given formal notice of their incumbrances to every trustee." And the Lord Chancellor says (2): "It is well-established (whether rightly or wrongly) that upon assignments or mortgages of equitable interests in property held by trustees the duty devolves upon the assignee or mortgagee to give to the trustees notice of the assignment or incumbrance. I will assume that this duty has been wisely thrown upon him, because of the expediency of giving to trustees notice of dealings with the property and in order to prevent fraud. But the whole question depends upon the kind of notice required, and with regard to this I entirely adopt what was decided in the case of *Smith* v. *Smith* (3) and the reasons laid down in that decision. It was there held that notice to one trustee was sufficient, because a subsequent incumbrancer or assignee would be under an obligation to inquire of every one of the trustees, and therefore he would have to inquire of the one to whom notice had been given."

These are distinct authorities that notice to one of several trustees gives priority. The ground of the decisions appears to be that a person about to take an incumbrance or assignment is bound to apply to each of the trustees and inquire as to the existence of prior incumbrances or assignments. It seems to be

(1) 4 D. F. & J. 147. (2) 4 D. F. & J. 150.
(3) 2 C. & M. 231, 233.

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assumed that if this is done the trustee to whom notice had been given of the prior incumbrance or assignment will communicate the fact; and experience shews that upon such occasions trustees (whether under any legal obligation to do so or not) usually do answer, and truthfully answer, the inquiries made. In the present case the trustee who had notice declined to answer. If it was his duty to answer, no attempt was made to enforce the obligation; whether there was or was not such a duty on his part (and I understand the Court of Appeal to have decided in the recent case of *Low* v. *Bouverie* (1) that there was not), the intending incumbrancer was content to go on with the transaction in the absence of any information from that particular trustee.

Under these circumstances, it seems to me that he proceeded at his own peril; and acquired no better title than his mortgagors could confer on him, and if the question had arisen in the lifetime of *Sharp*, the cases to which I have referred shew that the settlement would have been entitled to priority.

It is said, however, that this priority was lost when *Sharp* died. For this contention there is no authority. If, indeed, the subsequent incumbrances and assignment had been made after *Sharp's* death and before any notice of the settlement had been given to Mr. *Ellis* or Mr. *Evitt* the cases of *Timson* v. *Ramsbottom* (2) and *In re Hall* (3) shew that by giving notice to the then trustees the subsequent incumbrancer or assignee would have gained priority. These decisions rest on the non-existence of any person of whom the intending incumbrancer or assignee could make any effective inquiry, as is shewn by the judgment of Vice-Chancellor *Wigram* in *Meux* v. *Bell* (4). I will read a few words at pages 88, 89, and 97. After referring to *Timson* v. *Ramsbottom*, he says: "The Master of the Rolls held, notice to one executor of that transaction, was not notice to all; and having got rid of the technical objection, that notice to one, is notice to all, the question was reduced to this: at the time when the second incumbrancer took his security, was there any person living who had notice of the prior incumbrance being created?" Then he

(1) [1891] 3 Ch. 82.
(2) 2 Keen, 35.
(3) 7 L. R. Ir. 180.
(4) 1 Hare, 73.

says: "The inquiry is perfectly immaterial, if, in point of fact, at the time of the inquiry"—and that is the critical moment—"there is no existing notice; and that I conceive to be the law of the Court on the subject." Then at page 97 he says: "Lord *Langdale* did not there"—that was in *Timson* v. *Ramsbottom* (1)—"decide, that, if the trustee or executor, who in that case had notice, had been living at the time when the second incumbrancer gave notice of his incumbrance, the notice which that trustee or executor had, would not, in such circumstances, have been sufficient. He decided only, that there was no sufficient notice of the first incumbrance at the time when notice of the second incumbrance was given: and, undoubtedly, at that time there was no sufficient notice of the prior incumbrance, for inquiry of all the then existing trustees would have been unavailing." If there be at the time when the inquiry is made an existing notice, and the person making inquiry chooses to proceed in the absence of any answer from the trustee to whom it has been given, the reason on which these cases are based does not apply. In the recent case of *Low* v. *Bouverie* (2), Lord Justice *Lindley* (3) states the law thus: "An incumbrancer of a trust fund who first gives notice to any of its trustees obtains priority over any prior incumbrancer who has given no notice to any of them." If the correct view be that an intending incumbrancer or assignee who chooses to proceed without obtaining information from each trustee does so at his own peril, and thereby obtains only such title as his mortgagor or assignor can confer, I fail to see how that title is improved by the subsequent death of the trustee to whom the prior incumbrancer has given notice. I think, therefore, that the Chief Clerk's certificate must be varied by allowing the claims of the trustees of the settlement, and disallowing those of the mortgagees and assignee and the persons claiming under them. I need hardly say that this decision in no way affects any rights which the incumbrancers may have to the beneficial interest of Mrs. *Harley* under the settlement.

G. A. S.

(1) 2 Keen, 35. (2) [1891] 3 Ch. 82.
(3) [1891] 3 Ch. 104.

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From this decision the mortgagees appealed. The appeal came on for hearing on the 26th of November, 1891.

Upon the construction of the will the Court of Appeal held, agreeing with Mr. Justice *Stirling*, that there was a trust for conversion. They also held, upon the evidence, adopting the view of the learned Judge below, that *Sharp* had notice of the settlement at the time of its execution, but that *Ellis* had no such notice. The only question calling for a lengthened report was whether, assuming that *Sharp* had notice of the settlement, the notice, so to speak, "died with him," so that *Ellis*, on becoming sole trustee of the will, was to be treated as having no notice of the settlement, but as having notice of the mortgage, and thus became trustee of the fund for the mortgagees, and not for the trustees of the settlement.

Rigby, Q.C., and *E. S. Ford*, for the Appellants, the mortgagees:—

Our view of the evidence is that *Sharp* had no effectual notice of the settlement in the sense of being aware of its contents or of its execution. The evidence of Mrs. *Harley*, to the effect that he spoke of the settlement as a judicious act, is not to be relied upon, having regard to the fact that she was a party to making the false declaration.

But supposing he did know of the settlement and its contents and had notice informally, as in *Lloyd* v. *Banks* (1), it appears he never communicated them to his co-trustee, *Ellis*. Assignees of an equitable interest, in order to be secured, must take every step in their power to complete their title: *Phipps* v. *Lovegrove* (2); *Foster* v. *Cockerell* (3). Thus, the assignee of a fund must, in order to be safe, give notice to the trustees of the fund, and so turn them into trustees for him. Now, we may not have converted *Sharp* into a trustee for us—that is, assuming he already had notice of the settlement—but we did convert *Ellis*—who had no notice of the settlement—into a trustee for us. *Sharp's* notice, if any, of the settlement was personal to himself and died

(1) Law Rep. 3 Ch. 488. (2) Law Rep. 16 Eq. 80.
(3) 3 Cl. & F. 456, 476.

with him, and *Ellis*, the surviving trustee of the will, then became our trustee.

Priority by notice is founded on the principle that giving notice to the trustees is taking possession: *Dearle* v. *Hall* (1); *Loveridge* v. *Cooper* (2); *Foster* v. *Cockerell* (3). There can be no possession when there is no longer any trustee who has notice. In *Low* v. *Bouverie* (4), it is said that to say that notice to one trustee is notice to all is a misleading generality. *Browne* v. *Savage* (5) was cited against us below. That case has been much misunderstood, owing to a misprint in the judgment, where Lord Justice *Turner* is represented as having said that the rule was "not" for the security of the person taking the assignment, whereas what his Lordship had said was "not only" (6).

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[FRY, L.J., referred to the observations of Chief Baron *Parker* in *Ryall* v. *Rowles* (7).

BOWEN, L.J.:—Will notice to one of the trustees take the property out of the order and disposition of the assignor?]

Yes, as long as that trustee lives: *Smith* v. *Smith* (8).

In *Lloyd* v. *Banks* (9), Lord *Cairns* treats the effect of notice as being that it fixes on the conscience of the trustee, and through that upon the fund, a security against its being parted with in any way inconsistent with the incumbrance, *i.e.*, the incumbrancer by the notice makes the trustee his trustee, and when he has lost his trustee he loses the benefit of the notice. *Phipps* v. *Lovegrove* (10) goes on the principle that the advantage which an incumbrancer gains by thus making a trustee his trustee only lasts while he continues a trustee. In *Timson* v. *Ramsbottom* (11), where one of several executors took an assignment of his son's interest in the testator's estate without notice to the co-executor, and after his death the son assigned his interest to another person who gave notice to the surviving executor, the second assignee was held entitled to priority. The cases are reviewed

(1) 3 Russ. 1.
(2) Ibid. 31.
(3) 3 Cl. & F. 456, 474.
(4) [1891] 3 Ch. 82, 104.
(5) 4 Drew. 635.
(6) 1 De G. & J. 178.
(7) 1 Ves. Sen. 348, 367.
(8) 2 C. & M. 231.
(9) Law Rep. 3 Ch. 488.
(10) Ibid. 16 Eq. 80.
(11) 2 Keen, 35.

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in *Meux* v. *Bell* (1). In *In re Hall* (2), where, after the death of the trustee who had notice, the mortgagee incumbered again and the second incumbrancer gave notice, the second incumbrancer had priority. If, then, we had given notice to *Ellis* after *Sharp's* death, we should have had priority. The real principle is that, in order to have priority an incumbrancer must obtain possession and keep it. *Willes* v. *Greenhill* (3) does not affect us; for there the trustee who received notice was a trustee throughout, and the present question did not arise.

Hastings, Q.C., and *S. B. L. Druce*, for the trustees of the settlement:—

We do not dispute that if the Appellants' mortgage had been made after *Sharp's* death, and notice had been given to the trustees, the mortgage would have had priority: *Timson* v. *Ramsbottom* (4); *In re Hall*. The principle on which priority by notice is gained has been much discussed. It has not been contended that the question turns on whether the incumbrancer has done all he can, and that cannot be the principle, for if so notice to one trustee would not be enough, whereas it is settled that it is: *Smith* v. *Smith* (5); *Meux* v. *Bell*; *Browne* v. *Savage* (6); *Willes* v. *Greenhill*. There is difficulty in holding the principle to be the getting possession; for as one trustee cannot give possession, it is not easy to see how giving notice to one of several trustees can be a getting possession. *Ex parte Boulton* (7) helps us by stating the object of the rule: "Notices of this description operate not only to prevent the property which is the subject of the notice, being disposed of without the knowledge of the person, by whom, or on whose behalf the notice is given, but also to prevent injury to other persons from subsequent dealings with the property, affected by the notice, in ignorance of the prior claim upon it." It is submitted that *Smith* v. *Smith* and *Meux* v. *Bell* go upon this, that nothing is wanted to perfect the security as between assignor and assignee,

(1) 1 Hare, 73.
(2) 7 L. R. Ir. 180.
(3) 4 D. F. & J. 147.
(4) 2 Keen, 35.
(5) 2 C. & M. 231.
(6) 4 Drew. 635.
(7) 1 De G. & J. 163, 178.

but that notice is required in order to put a fetter on the fund, so that other people may not make advances in ignorance. In *Timson* v. *Ramsbottom* (1), the only person who had notice of the first assignment had died before the second assignment was made, so that no inquiry from the trustees could have led to discovery of the first assignment. The same observation applies to *In re Hall* (2). In *Ex parte Boulton* (3), the trustee who received the notice was living throughout; and so in *Willes* v. *Greenhill* (4).

[FRY, L.J., referred to *Etty* v. *Bridges* (5).]

We say that the principle of the cases is that priority is to be determined by what takes place while the trustee who has notice is there. If he dies without transmitting the notice, then matters stand, as regards incumbrancers who become such afterwards, on the same footing as if he had never been there; but as regards all incumbrances created during his life, the first assignee of whose assignment he has notice takes in priority to a second incumbrancer who gives notice to all the trustees.

Jason Smith, for the purchasers of the equity of redemption.

Spence, for the trustees of the will.

E. S. Ford, in reply:—

It is admitted that if there are two trustees, *A.* and *B.*, and an incumbrancer gives notice only to *A.*, who does not communicate it, and after *A.'s* death a subsequent incumbrance is made, of which notice is given to *B.*, the second incumbrancer has priority. Now take this case: A first mortgage is made, of which notice is given to *A.* but not to *B.* Then a second mortgage is made, of which notice is given to both. *A.* then dies, and a third mortgage is made, of which notice is given to *B.* The Respondents say, that 1 has priority over 2. But unquestionably 2 is prior to 3, for in each case complete notice was given, and priority of dates must settle the matter. Now, according to *In re Hall*, 3 has priority over 1. If, therefore, the Respondents are

(1) 2 Keen, 35.
(2) 7 L. R. Ir. 180.
(3) 1 De G. & J. 163.
(4) 4 D. F. & J. 147.
(5) 2 Y. & C. Ch. 486.

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right, we get this circle: 1 prior to 2, 2 prior to 3, 3 prior to 1, which is a *reductio ad absurdum*; and this absurdity appears still more clearly where 1 is an absolute assignment, 2 is a mortgage, and 3 is an absolute assignment. If an assignee gives notice to all, he makes all his trustees. If he gives notice to one only, he makes only that one his trustee, and on his death the assignee has no longer a trustee and loses his priority.

1891. Dec. 8. The judgment of the Court (*Lindley*, *Bowen*, and *Fry*, L.JJ.), drawn up by FRY, L.J., was read by *Lindley*, L.J.:—

Matthew Cotes Wyatt, by his will, bequeathed certain leaseholds in *Middlesex* to his son-in-law *Sharp* and one *William Ellis*, as trustees upon trusts for conversion, and declared certain trusts of the proceeds, under which *Mary Wyatt*, a reputed child of his son, *Matthew Wyatt*, was entitled to a share expectant on the death of her father, *Matthew Wyatt*.

The testator died in 1862.

In 1864, *Mary Wyatt*, in the lifetime of her father, then Sir *Matthew Wyatt*, contracted a marriage with a Major *Duncombe*, and on the occasion of that marriage a settlement was executed. *Sharp*, one of the trustees of the testator's will, had notice of this settlement; *Ellis* had no notice of it.

On the 27th of October, 1875, a mortgage was executed by *Duncombe* and his wife to Messrs. *Ward, Mason, & Pemberton*, of Mrs. *Duncombe's* share under the testator's will. Prior to the advance, inquiries as to notice of prior incumbrances were addressed by the solicitors of the intended mortgagees to both *Sharp* and *Ellis*. *Ellis* returned a truthful answer, that he had received no notice of any charge or incumbrance. *Sharp* replied by referring the applicants to the testator's will—an evasive answer, which left it absolutely uncertain whether he had or had not received any notice. Immediately on the execution of the mortgage, notice of it was given to *Sharp*, who did not, as requested, acknowledge its receipt, and to *Ellis*, who acknowledged its receipt. The mortgage was also registered in the *Middlesex* Registry.

Two subsequent further charges were executed by *Duncombe* and his wife in the year 1876, and similar inquiries and notices

were made and given, and with the like results as on the first occasion.

In August, 1878, *Sharp* died, leaving *Ellis* surviving, and in 1881 *Evitt* was appointed a trustee of the will in the place of *Sharp*.

In 1885 Mrs. *Duncombe* obtained a divorce from her husband.

In July, 1886, Sir *Matthew Wyatt* died, and the interest of Mrs. *Duncombe* and of her settlement trustees and mortgagees came into possession. In 1888 Mrs. *Duncombe* married Mr. *Harley*, and she is still living.

The conflict before us is one for priority between the trustees of Mrs. *Harley's* settlement and her mortgagees.

In thus stating the facts of the case we have expressed the conclusion at which we have arrived on three of the points in controversy. It was argued in the first place that the true effect of the testator's will was not a conversion of the leaseholds and a bequest of the proceeds, but a gift of the leaseholds subject to a power of sale to be exercised at the discretion of the trustees. To this contention we cannot accede; we think that the view taken by the learned Judge was correct.

In like manner, we think that he was correct in concluding from the evidence that *Sharp* had notice of the settlement at the time of its execution. He took an active part in its preparation, and, according to Mrs. *Harley*, he spoke to her after her marriage of the settlement as a judicious act on the part of her father.

Again, an attempt was made to prove that *Ellis* had in fact notice of the existence of the settlement; but this, in our opinion, is unsuccessful. In an affidavit sworn by *Ellis* and *Evitt*, the then trustees of the fund, and filed on the 7th of May, 1889, *Ellis* states distinctly that he received notices of the mortgage and two further charges shortly after their respective dates; that, amongst papers relating to the trust sent to him by Mr. *Sharp's* widow on his death there was no notice of any charge or incumbrance or any dealing with Mrs. *Duncombe's* interest under the will, and that the first notice or intimation he had of the settlement was given to him by his solicitors in October, 1886. We see no reason to doubt the accuracy of this statement.

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In considering the competing claims of the settlement and the mortgage, it is to be observed that both are equitable assignments, and that the settlement is prior in point of date, and there is no circumstance suggested as giving the mortgage a better equity except the fact of notice. Does the notice then given by the mortgagees to *Sharp* and *Ellis* prevail over the notice of the prior settlement given to *Sharp* alone?

It has been argued on behalf of the mortgagees that the notice to *Sharp* availed only so long as he lived; that, on his death, *Ellis* became the sole trustee of the fund; that he had no notice of the settlement, but had notice of the mortgage; that he was consequently trustee for the mortgagees and not for the settlement trustees, and ought to pay the money to his *cestuis que trust.*

In the event of the distribution of a fund which is vested in two or more trustees, it is the duty of both trustees to act, and for both to consider what notices each has received of charges or assignments. If, then, there be two trustees, each of whom has received a notice of a distinct charge, it would be the duty of both to act upon the notices received by each, and to deal with the fund according to the priority of the charges. To this extent and in this event, therefore, it may be said that notice to one trustee is notice to both.

It follows from this duty on the part of the trustees in the distribution of the fund, that a person who is about to take an equitable charge cannot do so safely until he has learned from every trustee of the fund that he has no notice of any existing charge, and it seems not unreasonable to hold that if he take without such information he ought to be postponed to any charge of which notice has been given to any one of the existing trustees, and of which, on the assumption that the trustee told the truth, he would have acquired knowledge if he obtained an answer from the trustee. If the trustee who has received the notice has died before the charge in question is taken, it may be that the notice has become inoperative, and the second charge may, by inquiry and notice duly made and given, acquire a priority. It may be true to say that the notice to *Sharp* availed only so long as he lived, and yet the fact that he was alive when the mortgage was taken may be sufficient to postpone to the settlement of

which he had notice that mortgage which was taken without any information from him as to the charges of which he had received notice. The time of the taking of the subsequent charge, or, more exactly, the time when inquiry was or ought to be made of the trustees, and not the period of distribution, thus appears to be the critical moment.

This line of reasoning has much to commend it on principle; but, whether right or wrong, it appears to us to have been adopted by authorities which are binding on us.

In *Smith* v. *Smith* (1), decided in 1833, Lord *Lyndhurst*, C.B., giving the judgment of the Court of Exchequer (2), said: "A second assignee, in order to have obtained a priority over the plaintiff, must have shewn that he had exercised proper caution in taking the assignment; that he had applied to the trustees to know if any previous assignment had been made; and, unless he applied for this purpose to each of the trustees, he would not have exercised due caution, or done all that he ought to have done. But, if he applied to each of the trustees, he would have been informed by one of them, Mr. *J. Smith*, of the previous assignment to the plaintiff, and he must then have taken the property, if at all, subject to the claim of the plaintiff."

In *Meux* v. *Bell* (3), decided in December, 1841, Vice-Chancellor Sir *James Wigram* adopted as the criterion by which the rights of the successive incumbrancers were to be regulated this question—Was there in point of fact at the time of the inquiry by the second incumbrancer an existing notice of the first charge? If there was, the first incumbrancer retained his priority; if there was not, he lost it; and he shewed how the case of *Timson* v. *Ramsbottom* (4), which had been decided after *Smith* v. *Smith*, in which the second mortgagee obtained priority, was consistent with this principle, because in that case, at the time when the second incumbrancer took his security, there was no person living who had notice of the prior incumbrance being created.

Lastly, in *Willes* v. *Greenhill* (5), decided in November, 1861,

(1) 2 C. & M. 231.
(2) Ibid. 233.
(3) 1 Hare, 73.
(4) 2 Keen, 35.
(5) 4 D. F. & J. 147.

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the Lord Chancellor (Lord *Westbury*) (1) said: "I entirely adopt what was decided in the case of *Smith* v. *Smith* (2) and the reasons laid down in that decision. It was there held that notice to one trustee was sufficient, because a subsequent incumbrancer or assignee would be under an obligation to inquire of every one of the trustees, and therefore he would have to inquire of the one to whom notice had been given."

These cases do not in the exact circumstances agree with the one before us; but they shew that whilst *Sharp* was living the settlement had priority over the mortgage. It would be strange if his death, all other circumstances remaining the same, could change the priorities, if the rights of *cestuis que trust* as between themselves were altered by the death of one of their trustees, or if those rights depended on which of the trustees might die first.

The cases which were especially pressed upon us as authorities to the contrary of those which we have above cited were *Timson* v. *Ramsbottom* (3) and *In re Hall* (4); but in both those cases the second charge was taken after the death of the trustee to whom the notice of the prior assignment had been given; and, consequently, no diligence in making inquiry would have led to a disclosure of the prior incumbrance.

In the present case, as *Sharp*, the trustee who had received notice of the settlement, was alive when the mortgage and the further charges were taken, and as the mortgagees thought fit to advance their money without any information being given by him, we are of opinion that they so lent the money, subject to the priority of any incumbrance or assignment of which he had received notice. To inquire of a trustee, and to proceed without answer from him, is, in our opinion, the same thing as proceeding without inquiry.

An ingenious puzzle was propounded by Mr. *Ford* in the course of his able reply to induce us to depart from the principle which we have stated. Suppose, he said, there are two trustees of the fund, *A.* and *B.* The first incumbrancer gives notice of his charge to *A.* only; the second gives notice of his charge to *A.* and *B.*; then *A.* dies, and a third incumbrance is created, of which notice

(1) 4 D. F. & J. 150.
(2) 2 C. & M. 231.
(3) 2 Keen, 35.
(4) 7 L. R. Ir. 180.

is given to the surviving trustee *B*. Here, it is said, that the third incumbrance will stand after the second because *B*. had notice of the second incumbrance; but he will also stand before the first, for *B*. was unaffected by any notice of that incumbrance. The solution of the difficulty is probably to be found in the view that the third incumbrancer is subrogated to the rights of the first to the extent of his charge, and to that extent, and that extent only, can take in priority of the second incumbrancer, by which the latter sustains no injury, but that as to any excess of the amount claimed by the third incumbrancer, he comes in after the second, so that the fund would be distributed as follows: First, to the third incumbrancer to the extent of the claim of the first. Secondly, to the second incumbrancer. Thirdly, to the third incumbrancer to the extent to which he might remain unpaid after the money he had received whilst standing in the shoes of the first incumbrancer: see *Benham* v. *Keane* (1), where a similar problem was similarly solved.

Our attention was called in the argument before us to the various principles or analogies on which the doctrine of notice has been based, and we were invited to choose between them with a view to the decision of this case. In some authorities the giving of notice in respect of a *chose in action* has been likened to delivery of a *chose* in possession: in some cases the Court has relied on the necessity of preventing frauds by *cestuis que trust* in creating successive incumbrances without disclosing the earlier ones: in some on the notion that no person shall claim advantage from the assignment of a *chose in action* who has not done everything requisite to complete the title: in some on the view that the notice converts the trustee for the assignor into a trustee for the assignee. It may well be that these doctrines are not entirely co-extensive; for instance, if notice be equivalent to delivery, it would seem to be good for all time; whereas, if notice operates only on the mind and conscience of the trustee, its effect may cease on the death or retirement of the trustee. It may be that the doctrine of notice rests on more principles than one. But on these difficult questions we do not feel at liberty to enter, because, as we have already shewn, we hold that the law,

(1) 1 J. & H. 685; 3 D. F. & J. 318.

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as enunciated by Mr. Justice *Stirling*, has been laid down by cases which we are not at liberty to review. The appeal must, therefore, be dismissed.

Solicitors: *Robins, Hay, Waters, & Lucas; Fardell & Canning; Budd, Johnsons, & Jecks.*

H. C. J.

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July 29.
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Dec. 10.

In re LEPINE.
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[1889 L. 1886.]

Executor—Legacy—Specific Assets, Appropriation of—Incomplete Transaction —Deposit of a Mortgage Deed.

An executor has power, even though no express authority be given him for that purpose in the will, to agree with a legatee to appropriate a specific portion of the estate to him.

An executor, who had no special authority for that purpose, agreed with one of the residuary legatees to appropriate to him a mortgage as part of his share, and for that purpose handed to him the mortgage deed, but executed no transfer of the mortgage to him. At the time when this was done the sum secured by the mortgage was not more than the estimated amount of the legatee's share in the residue; but by reason of the subsequent loss of some of the assets the residuary estate was greatly reduced, and the other residuary legatees claimed the mortgage as part of the testator's assets:—

Held (reversing the decision of *Kekewich*, J.), that the appropriation was complete, and that the legatee could not be deprived of the mortgage.

GEORGE LEPINE, by his will dated the 14th of September, 1877, gave the residue of his real and personal estate to *J. R. Lewis* and the Defendant, *C. T. Culver*, upon trust to convert the same, and after payment thereout of his funeral and testamentary expenses, debts, and legacies, to stand possessed of the residue of the proceeds thereof, as to one-sixth part in trust for his niece *Ann Jackson*, and as to another sixth part for his nephew *George Lepine Jackson*, and as to another sixth part for his nephew *Finch L. Jackson*, and as to another sixth part in trust, to invest the same in the names or name of the trustees or trustee, with power for them in time to vary the investments and to pay the income thereof to his sister, *Alice L. Jackson*,

during her life, and after her death for her son, the Plaintiff, *Thomas F. Jackson*; and as to another sixth part in trust to invest the same in manner aforesaid, and to pay the income to the Plaintiff, *George F. Dowsett*, during his life, and after his decease in trust for his wife and children, as therein mentioned; and as to the remaining sixth part in trust to invest the same in manner aforesaid, and to pay the income to his niece, *Mary E. Strange*, during her life, for her separate use, without power of anticipation, and after her death in trust for her children, as therein mentioned. And the testator appointed *J. R. Lewis* and the Defendant executors of his will. The will contained no express power to appropriate specific portions of the estate to the residuary legatees.

The testator died on the 23rd of May, 1878, and his will was proved by the Defendant alone, *J. R. Lewis* having renounced probate.

The testator's residuary real estate was valued at his death at about £1750, and his residuary personal estate at about £18,163, of which upwards of £11,000 was invested on mortgage.

The present action was brought by *G. F. Dowsett*, the tenant for life of one of the settled shares, against the executor *Culver*, who was said to have misappropriated some of the estate and had absconded, for administration of the testator's real and personal estate. *Culver* did not appear, and judgment for administration and a receiver was given in his absence.

It appeared from the Chief Clerk's certificate that the Defendant had, soon after the testator's death, deposited with *George L. Jackson*, as part of his sixth share of the estate, a mortgage deed dated the 4th of January, 1870, by which a sum of £700, with interest, was secured to the testator. No transfer of the mortgage to *George L. Jackson* had been executed, but he received the interest on the mortgage debt. The Defendant had also paid *George L. Jackson* £2270 in further satisfaction of his share. It eventually turned out that in consequence of the loss of some of the assets, the two sums of £700 and £2270 represented more than the proper amount of his share. The action now coming on for further consideration, the Plaintiff asked for a declaration that the mortgage of the 4th of January, 1870, was

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not properly made over to *George L. Jackson* in part satisfaction of his share of the testator's estate.

The further consideration was heard before Mr. Justice *Kekewich* on the 29th of July, 1891.

Carson, for the Plaintiff.

S. Eady, for *George Lepine Jackson*, contended that this was a case of retainer, not of appropriation, and, that having received his share, he could not now be called upon to refund or to give up the mortgage deed: *Peterson* v. *Peterson* (1); *Rummens* v. *Hare* (2).

A. àB. Terrell, and *W. Baker*, for the tenants for life of two of the settled shares.

KEKEWICH, J.:—

Experience tells me that much misapprehension exists concerning the duties of trustees who have to divide the trust estate among several persons, some of whom are not absolutely entitled, their shares being settled in such a way that they cannot themselves give a complete acquittance to the trustees. That is the case here. The residuary estate of the testator is directed to be converted and then divided into sixth shares. Three persons are absolutely entitled, and the other three sixth shares are separately settled. Now, what is the duty of a trustee having such a trust as that to perform, and having no express power of appropriation, such as is usually inserted in a well-drawn will when the testator settles his property in this way? I apprehend the duty of the trustee is perfectly clear. He must realize the whole estate, divide the property into as many shares as there are persons, or stirpes as regards the settled shares, and give to each legatee or set of legatees his or their aliquot share of the entire fund. That possibly may be to some extent made easier by the trust to invest. He is not bound to realize securities which are investments authorized by the will, and about which there can be no possibility of doubt

(1) Law Rep. 3 Eq. 111. (2) 1 Ex. D. 169.

as to their price apart from speculation, as, for instance, Consols. In a case of that kind he need not actually sell; he can take the securities at the price of the day—nay, more than that, he may, without impropriety or appreciable risk, give to *A.* a share of Consols at the price of the day, and to *B.* a share—say, of *India* 3½ per Cents.—at the price of the day, those being authorized securities. But directly he goes beyond such a simple proceeding as that, and does not divide the money in cash, he, to my mind, runs considerable risk of afterwards being called to account for breach of trust. Mr. *Eady* has argued that when once a man has been fully paid there is an end of it, and the subsequent loss to the trust estate cannot affect him in any way. That is a recognised principle, expounded with admirable clearness by Lord *Romilly* in his judgment in *Peterson* v. *Peterson* (1); but the question is, Has the man been paid or not? Now, in this case there were three persons absolutely entitled, and Mr. *George Lepine Jackson*, Mr. *Eady's* client, as one of those persons, was entitled to have his one-sixth paid over to him, whereupon the trustee was minded to pay him his one-sixth, and he accepted as part of his one-sixth share a mortgage for £700. I followed Mr. *Eady's* observation that this mortgage could not have been worth more than £700: it was not speculative in that sense; but I hold that Mr. *G. L. Jackson* was not entitled to have that mortgage at all. It might have been possible for the trustee to look into all the mortgages included in the trust estate to satisfy himself that they were all good, all sufficient to produce the principal moneys and interest charged on the properties, and then to have made some appropriation among the legatees. I do not think myself that even then the trustee could have done this without risk, except under the direction of the Court, unless he had appropriated those mortgages in aliquot shares among the parties; but if the mortgages had all turned out satisfactory, being all valued at par by the trustee, the result would have been to save him harmless. But without a power of appropriation, or without an order of the Court, I hold it to be impossible for this trustee to take a mortgage and say, that is a part of *A.'s* share, and to take another mortgage and say, that is

(1) Law Rep. 3 Eq. 111, 114.

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part of *B.'s* share. That is not what the trustees of this will are directed to do. They are directed to convert the property into cash, and then pay over three of the aliquot shares in cash and invest the other three in authorized securities. What in fact was done was that Mr. *George Lepine Jackson* took a mortgage for £700 in part payment of his share. In my opinion, he is not entitled now to say, "I have been paid," because, dealing with a trustee and knowing that he was taking an aliquot share with others, he is fixed with notice that the trustee was doing that which he was not entitled to do, and he can derive no benefit from the transaction. To my mind, the arrangement that Mr. *G. L. Jackson* should take this mortgage for £700 as part of his one-sixth share could not be made against the other parties. It has unfortunately turned out that the rest of the estate is not sufficient to pay the others their full shares. The rule laid down by Lord *Romilly* does not apply to this case, because there is no evidence before me that there ever has been any payment or any complete appropriation; consequently, Mr. *G. L. Jackson*, having been overpaid, must make the amount good.

G. I. F. C.

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From this decision *G. L. Jackson* appealed. The appeal was heard on the 10th of December, 1891.

Cozens-Hardy, Q.C., and *S. Eady*, for the Appellant:—

It is not incumbent on executors to convert every portion of the estate into money. They may agree with the residuary legatees to accept any specific part as part of their share. If they had not this power, it would in many cases be almost impossible to wind up the estate.

[They were stopped by the Court.]

Carson, for the Plaintiff; *A. àB. Terrell*, and *W. Baker*, for the tenants for life of the two other settled shares:—

The mortgaged estate is still part of the testator's assets. The will contained no power to the executor to appropriate specific portions to particular legatees; and in the absence of such a power the executors cannot do so without the consent of

all the residuary legatees. If he could do so, he might appropriate a valuable part of the estate to one residuary legatee and a worthless part to another. But even if he has this power the transaction can only be valid when it is completed. The Court will not interfere to carry into effect an incomplete appropriation. In the present case there has been no transfer of the mortgage; and the Appellant cannot get the legal estate without the assistance of the Court. He is in the position of a person to whom there has been an incomplete gift without consideration to support it. The Court never interferes to carry out such a transaction: *In re Richardson* (1).

LINDLEY, L.J.:—

If all that has been said about what executors cannot do were true, executors would find it very difficult to administer any estate at all. The trusts of this will are simple enough. [His Lordship stated the effect of the will, and continued:—] What appears to have been done is this. The executor, the Defendant, Mr. *Culver*, shortly after the testator's death proceeded to distribute the estate. One of the persons entitled to one-sixth was a person who was of age and capable of entering into an agreement with the executor as to how he would take his sixth; and, instead of taking it in cash, he and the executor agree together that he should take a mortgage for £700 in part payment of his legacy. Assuming for the moment that there were assets, and that the £700, in addition to what he got in cash or other securities, did not exceed the amount due to him, what is there amiss with that? What is there to prevent the trustee or the executor making such a transaction? It is said that he cannot do it. It is said that the executor cannot make an agreement with one legatee of one-sixth without the consent of all the persons entitled to the other five-sixths. But why? If the assets are amply sufficient to satisfy the other five-sixths, why cannot one legatee at once say, "I will not trouble you to turn my share into cash; give me something instead of it which I will take." Of course, it must be a fair transaction. The legatee says, "There is a mortgage for £700—a very good security—and

(1) 30 Ch. D. 396.

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I am content to take it at £700." Nobody is likely to give more than twenty shillings in the pound, I suppose, for a mortgage—and he takes it at that price. He does not take a legal transfer of the mortgage—that is true, but he takes the deed. For more than ten years he takes the interest on the mortgage, and now, because the executor has, some ten years after the death of the testator, absconded, and some of the residuary estate cannot be found—some of the settled shares, I suppose, have been made away with—it is said, on behalf of the persons entitled to the settled shares, "You, the legatee, who have been satisfied, must refund or give up the mortgage security." On what conceivable principle is he to do that? Just consider what has been done. The inference from that which took place is irresistible. The true inference is that the legatee took this mortgage in satisfaction of his legacy to the extent of £700. It might have been put in a more formal shape. The executor might have said to the legatee, "I can sell you this mortgage for £700. Will you buy it, and will you agree to set off your legacy against the purchase-money?" All that might have been gone through; but the substance of that has been done; and to say that an executor cannot enter into a transaction like that with a residuary legatee, or any other legatee, is tantamount to saying that an executor cannot do what any other business man could do with similar obligations. I cannot accede to the proposition that the executor in any way failed to discharge his duty to that legatee or to the other legatees, provided, as I said before, he did not give any legatee more than his share. That is the whole of this transaction. The claim is based upon the theory that the three legatees who were entitled to receive their shares have not received them; and there is nothing in the pleadings seeking in any way to disturb what has been done. The pleadings are simply addressed to getting in and protecting what remains, and in the course of the inquiry the facts to which I have alluded have come out and the learned Judge has taken away from the legatee the mortgage which he has received in satisfaction of his legacy, because, forsooth, he has not got a legal transfer. Whether this gentleman will ever be able to get a legal transfer from Mr. *Culver*, who has absconded, I do not know; he may perhaps be

able to get a vesting order—I do not say anything about that. He is not asking us for anything; he is only asking to remain as he is.

It appears to me that those who have brought him here, who have raised this controversy, and sought to deprive him of his mortgage, must pay the whole of the costs here and below.

BOWEN, L.J.:—

I should not add anything except that we are differing from the judgment of a very experienced Judge, and, therefore, I wish to add my view of the matter. The Respondents' case has been argued with the greatest ingenuity by Mr. *Carson* and Mr. *Terrell*, and I cannot conceive any better way of putting their case. But the more you look at the case and sift it, the more clear it becomes, to my mind, that it breaks down. They have endeavoured to assimilate this to the case of a voluntary assignment of a beneficial interest in a mortgage without consideration, and one not completed by a transfer of the legal estate.

Now, the first observation that occurs to me is that this is not the case of a voluntary assignment without consideration. It seems to me that there is ample consideration of a character which will appear in a moment; it was a completed transaction, and, if it is equivalent to a payment, it is quite certain that this cannot now be set aside. It seems to me that it is accord and satisfaction—that is equivalent to a payment. The transaction had been effected by the handing over of these deeds to the legatee and his receipt of the amount of interest in respect of the mortgage. It cannot be doubted that the executor might have sold the mortgage by private contract for what it was worth. It cannot be doubted that he might sell it to the legatee, and agree to set off the purchase-money against the legacy; and then he might further agree with the legatee that he should hold the legal estate for him. The whole of that can be put in a short compass, and it is exactly what has been done. The right to the legal estate is not a right which, after this transaction, any longer depends upon the will: it depends upon the transaction itself. I cannot myself see how executors

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could carry on business if this sort of arrangement was to be invalid.

FRY, L.J.:—

I also find myself unable to agree with the learned Judge. There are two propositions which have been put before us in various forms by the learned counsel who have argued for the Respondents which, I think, are perfectly true. Supposing an executor or trustee divides the estate in such a manner as that he gives to one legatee or *cestui que trust* property or securities worth twenty shillings in the pound, and he gives to another rubbish and trash which is not worth its nominal value, or the value at which he takes it, I have no doubt that such trustee or executor is guilty of a breach of trust, and that any legatee who takes the good securities with notice of what has been done may be made liable for that breach of trust. That is one proposition that, I think, is perfectly true. Another which has been put forward from time to time is to this effect: Where there is an imperfect gift made and the legal estate remains in the donor there being no consideration, the whole transaction being in the nature of a gift, there the Court will not assist the donee to perfect that gift. That, again, is a perfectly true proposition of law. But neither of those two propositions of law seems to me to have the remotest relation to the present discussion. In the present case, for anything that appears, the trustee did his duty at the time at which he divided the estate. There is no suggestion before us that he improperly appropriated the funds to the settled shares, or that he shewed any favour whatever to *George Lepine Jackson*, to whose share he appropriated this mortgage.

It appears to me that all that is before us is this. The executor, being under an obligation to realize the estate and to get it in, got in this mortgage by sale of it to *George Lepine Jackson*, and *George Lepine Jackson* agreed to set off the purchase-money which he was to pay for that mortgage against his share of the estate. If that was done honestly and righteously and equally, between all the *cestuis que trust*, that was an unobjectionable transaction—that is all that it was. I think, therefore,

that there is nothing whatever to be complained of in this transaction.

I am bound to say that I cannot assent to the view which the learned Judge has taken of the obligation of trustees. I agree, as fully as it can be expressed, that it is the duty of trustees to hold a perfectly even hand between all their *cestuis que trust*; but, provided they do that, there is no objection whatever to their entering into arrangements which are of the nature of the sale of a particular asset, which they are bound to convert, to a *cestui que trust*, setting off the purchase-money for that asset against the portion which the *cestui que trust* is entitled to in the testator's estate.

I think, therefore, that the judgment below must be reformed by striking out the declaration of the learned Judge to the effect that this forms part of the estate of the testator.

Solicitors: *Warren, Gardner, & Murton*, agents for *Hallett, Creery, & Co., Ashford; Minshall, Parry-Jones, & Co.*, agents for *Bridgman & Co., Chester; E. A. Fuller; Sole, Turner, & Knight.*

M. W.

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Conflict of Laws—Jus gentium—Company—Debentures—Charge on Unpaid Capital—Scotch Arrestment—Priority—Notice.

The *U. Bank* held debentures issued by the *Q. Company*, which was domiciled in *Queensland*, charging the unpaid capital in respect of shares in the *Q. Company*. After such capital had been called up, but before it had been paid, the *A. Company* commenced an action against the *Q. Company* in *Scotland* for damages, and arrested the calls on the *Q. Company's* shares held in *Scotland*: the holders of such shares had no notice of the debentures. The *Q. Company* was ordered to be wound up in *Queensland* and also in *England*. An order was made in the English winding-up restraining the *Australasian Company* from prosecuting the action in *Scotland*, but without prejudice to the security, if any, which they had acquired upon the amounts payable on the Scotch shares by the

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proceedings in *Scotland*; and an order was also made by the Court of Session in *Scotland* recalling the arrestments and restraining the proceedings in *Scotland*, but subject to the further order of the Court.

It was in evidence that under the Scotch law the arrestment was equivalent to an assignment with notice to the debtor, and took priority over an earlier assignment without notice; and further, that according to the Scotch law and the *jus gentium* as administered in *Scotland*, the Scotch arrestments would, under the circumstances, have priority over the assignment by the debentures, notwithstanding the fact that the creditor was domiciled in *Queensland* and the place of payment was in *England*, whatever the law of those countries might be:—

Held (affirming the decision of *North*, J.), that the question of priority on the proceeds of the Scotch shares must be regulated by the law of *Scotland*, and that this Court was bound to have regard not only to the municipal law of Scotland, but to the administration of the *jus gentium* by the Scotch Courts. The *A. Company* was, therefore, held to have the first charge on such proceeds.

THIS was an appeal from a judgment of Mr. Justice *North* (1), made on the hearing of two summonses in the winding-up of the *Queensland Mercantile and Agency Company*, an Australian company, which was being wound up both in *England* and *Australia*.

The facts were shortly as follows:—

The *Union Bank of Australia* (*Limited*), an English company, held two debentures issued by the *Queensland Mercantile and Agency Company*, in the year 1866, to the amount altogether of £60,000, whereby the payment of such debentures was made a first charge on the uncalled capital receivable in respect of shares numbered from 1 to 2500 in the *Queensland Company*, upon each of which shares £50 had been paid up and £50 remained uncalled.

On the 14th of December, 1886, the *Queensland Company* passed resolutions calling up the balance of £50 on each share. Notice of the call was given to the shareholders; but they had no notice of the charge effected by the said debentures in favour of the *Union Bank of Australia*. On the 24th of February, 1887, the *Australasian Investment Company*, a Scotch company, commenced an action in *Scotland* against the *Queensland Company* for negligence, and immediately afterwards, on the same day, issued a Scotch process, known as an arrestment on the defence of the

(1) [1891] 1 Ch. 536.

action, against numerous holders of the shares in the *Queensland Company* who were resident in *Scotland* and had not paid their calls; the effect of which was that the calls payable by them to the *Queensland Company* were arrested in their hands, and the *Australasian Investment Company*, the pursuers in the action, became secured creditors on the funds so arrested for the amounts for which they should establish their claims in the action.

In the months of May, July, and August, 1887, judgments were recovered in *England* by one *Drake* and others in twenty-seven actions against the *Queensland Company*. On the 2nd of September, 1887, the *Union Bank of Australia* commenced an action against the *Queensland Company* in respect of money due to them, other than that secured by the two debentures; and, on the 7th of September, an order was made in all these actions for the appointment of a receiver to get in the calls from the shareholders in the *Queensland Company*.

On the 28th of October, 1887, an order was made in *Queensland* for the winding up of the *Queensland Company*, and thereupon the £60,000 secured by the two debentures became payable. On the 14th of January, 1888, a similar order was made in *England*.

On the 9th of March, 1888, an order was made by Mr. Justice *North* restraining the *Australasian Company* from prosecuting the action in *Scotland*; but the order was to be without prejudice to the security, if any, upon the amounts payable by the Scotch shareholders in the *Queensland Company* in respect of the calls made by the last-named company on the 14th of December, 1886, which the said *Australasian Company* had acquired by the proceedings taken by them in *Scotland*; and it was ordered that, without prejudice to any question between any of the parties claiming to be entitled to the proceeds of the said calls, the liquidator should carry over such part of the proceeds of the said calls as should be received from Scotch shareholders to a separate account. And by a subsequent order the Scotch shareholders were ordered to pay the amount of their calls into the *Bank of England*.

On the 17th of July, 1888, the Court of Session in *Scotland*

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made an order recalling the arrestments and restraining the *Australasian Company* from prosecuting the action in that Court, but subject to the future orders of the Court.

The *Union Bank of Australia*, by their summons, asked for an order upon the Official Liquidator to transfer to them, on account of their claim, the sums he had received in respect of the shares numbered 1 to 2500, including those he had received from the Scotch shareholders. The *Australasian Investment Company* claimed, on the other hand, to be first paid out of the moneys received from the Scotch shareholders £12,666 4*s.* 5*d.*, which had been found in the English winding-up to be the amount of the claim due to them. The Plaintiffs in the actions of *Drake* and others against the *Queensland Company* also asserted a claim to the funds in hand against both the *Union Bank* and the *Australasian Company*, on the ground that as against them the debentures were inoperative.

Evidence was given by the *Australasian Investment Company* that, according to the law of *Scotland*, the arrestment was equivalent to an assignment with intimation or notice to the debtor, and took priority over an earlier assignment without intimation. The law of *Queensland* on this matter was the same as that of *England*.

Mr. Justice *North* held that in the English winding-up the question of priority on the proceeds of Scotch shares was regulated by the law of *Scotland*, and that the *Australasian Investment Company* had the first charge on such proceeds.

From this decision the *Union Bank of Australia* appealed. The English judgment creditors did not appeal.

At the trial before Mr. Justice *North* the only evidence as to the Scotch law was an affidavit of Mr. *John Blair*, a Writer to the Signet, a member of the firm at *Edinburgh* who were the solicitors of the *Australasian Investment Company*.

Mr. *Blair's* affidavit contained the following passage (par. 10): —" It is not competent, according to the law of *Scotland*, to create a security by merely charging an asset with the debt, and the two debentures referred to do not, therefore, according to the said law, create such a security. In order to create a security over personal or moveable estate in *Scotland* it is necessary,

if corporeal moveables, that they be placed in the possession of the creditor, and if incorporeal that any assignment thereof be executed and duly intimated to the debtor. Hence, in the present case to have made the charge on the said debentures on the uncalled capital effectual, even while the company remained out of liquidation, the debentures should have been intimated to the shareholders liable for the calls. This, however, was not done, and those shareholders respectively knew nothing of the charge until after the *Queensland Company* went into liquidation. Long before they knew of it, the said arrestments by the *Australasian Company* had been made, and the assignment thereby created, being prior in date, was, by the law of *Scotland*, preferable to the said charge."

At the hearing of the appeal, after the counsel for the Appellants had concluded their arguments, the Court considered that the parties ought to have the opportunity of obtaining further evidence as to the Scotch law, and adjourned the hearing for a month for that purpose. The opinions of Sir *C. J. Pearson*, Advocate-General, and two other counsel, Mr. *A. Asher* and Mr. *H. Johnston*, were obtained by the *Union Bank of Australia*, and those of Mr. *J. B. Balfour*, Dean of the Faculty, and Mr. *Graham Murray*, Solicitor-General for *Scotland*, by the *Australasian Investment Company*. They all, however, substantially agreed with Mr. *Blair*. The Dean of the Faculty and the Solicitor-General for *Scotland*, in their joint affidavit, said that the opinion of Mr. *J. Blair* was correct; and further, "that, assuming the facts stated to be correct, then, according to the law of *Scotland* and the *jus gentium* as administered in the Courts of *Scotland*, the said arrestments will have priority over the assignment of the debentures, notwithstanding the fact that the creditor in the debts is domiciled in *Queensland*, and the place of payment of the debts in *England*, whatever the local law of those countries may be as to the necessity of intimation to the debtor to perfect an assignment."

Sir *H. Davey*, Q.C., *Buckley*, Q.C., and *S. Dickinson*, for the Appellants, contended, as in the Court below, that the law of the domicil of the creditor, that is, the *Queensland Company*, to whom

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the calls were due, must prevail, that being the doctrine of international law as understood by the English Courts.

Crackanthorpe, Q.C., and *Rawlins*, for the *Australasian Investment Company*:—

The case is to be decided according to Scotch law. The orders for restraining the Scotch proceedings were made on that understanding. The view which the English Courts entertain of the international law makes no difference. Now that we have obtained further evidence as to the Scotch law, there can be no doubt that the Scotch Courts would decide the case in our favour.

[They were stopped by the Court.]

Sir *H. Davey*, in reply:—

The evidence of the Scotch advocates is not conclusive in this case. It is not, properly speaking, a question of Scotch law; if so, their evidence would be decisive; it is a question how the Scotch Courts would decide a question of international law. On that point their evidence is only their own opinion. We have no judgment of the Scotch Courts to bind us; we have to determine what the international law is upon the subject, and on that question the English Courts have a right to form their own opinion: *Simpson* v. *Fogo* (1). We do not dispute the evidence of the witnesses on the Scotch law as to the assignment of *choses in action*; but the international law is the same all over the civilised world, and the Scotch Courts cannot administer it in a different way to other countries.

LINDLEY, L.J.:—

The question before us seems to me to be an extremely short one now that we have got the additional evidence.

The question arises in this way. The *Queensland Mercantile and Agency Company, Limited*, is being wound up in this country as well as abroad. There is a controversy as to who are entitled to the uncalled capital of the company. On the one hand, there are Sir *Horace Davey's* clients, the *Union Bank of Australia*, who

(1) 1 H. & M. 195.

claim the uncalled capital under certain debentures which have been issued to them for money borrowed from them. On the other hand, there are Mr. *Crackanthorpe's* clients, the *Australasian Investment Company*, who claim the uncalled capital under certain proceedings which they have taken in *Scotland*, and which resulted in an arrestment in *Scotland* of the calls owing from the Scotch shareholders to the company. Under those circumstances, a series of orders have been made, some in this country and some in *Scotland*. The important ones are, first of all, the order which was made by Mr. Justice *North*, dated the 9th of March, 1888, which restrained the Scotch action of Mr. *Crackanthorpe's* clients, "without prejudice to any question between any of the parties who claim to be entitled to the proceeds of the said calls." That was followed on the 25th of April by an order made by Mr. Justice *North* on the Scotch shareholders to pay the amount of their calls into the *Bank of England*. That was registered in *Scotland* on the 17th of May. All this was after the arrestment. On the 20th of June, 1888, a petition was presented to the Scotch Court to recall the arrestment, and it was recalled on the 17th of July, 1888, and on the same day the Scotch action was stayed.

Now it is quite obvious from the terms of the order of the 9th of March, 1888, and what fell from the Scotch Judges when they recalled their arrestment in July, 1888, that the whole was done, I do not say upon the faith, but in order that the money might come into this country and be subject to the orders of this Court, so that this Court should decide the claims of Mr. *Crackanthorpe's* clients as they would have been decided in *Scotland* if the Scotch proceedings had gone on.

When the case was before us some little time ago, we intimated that the evidence before us as to what the Scotch law would have been was imperfect, and accordingly it has been supplemented, and as supplemented it is plain, and really not in controversy, that the Scotch Court would unquestionably decide in favour of Mr. *Crackanthorpe's* clients.

That being so, can we properly decline to accede to that view and take the opposite view? Sir *Horace Davey* says, Yes, we can; and he says the Scotch Courts could only arrive at that

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conclusion, which he admits on the face of the evidence they would arrive at, by taking an erroneous view of international law. He says, international law is one thing of which we have judicial cognizance, and that if the Scotch Courts took an erroneous view of it we must act upon our own view, and he refers to the case of *Simpson* v. *Fogo* (1) in support of that contention. Now, I do not understand *Simpson* v. *Fogo* to go that length. In *Simpson* v. *Fogo* the Court of *Louisiana* ignored international law and would have nothing to say to it. That case relates to the title to an English ship, and the Court of *Louisiana* decided the question of title to the English ship not by English or international law or anything of that sort, but by their own law, ignoring the English law and throwing over international law and everything else; and, in that view, the English Court declined to be bound by the decision of the Court of *Louisiana*.

Now, what underlies Sir *Horace Davey's* contention is, I think, a mistake. It is all very well to say that international law is one and indivisible, of which we take judicial notice; but we cannot be ignorant of the fact that various civilized countries take different views of it; and are we to say that the Scotch Court is wrong because it takes a different view of the application of international law than that which we should take? I think not. This part of the international law as recognised by the Scotch law becomes part of the Scotch law, and, to my mind, this Court, at all events, is not at liberty to review international law so far as it becomes part of the Scotch law, and which Scotch lawyers say is Scotch law. The fact is, of course, notorious to us all, that if anybody studies private international law out of a French law book, he takes one view of it; if he takes an American law book, he takes another view of it; and if he takes a German law book, he takes another view. They do not all take the same view. We have to ascertain and see how much of the international law the Scotch law has incorporated and grafted upon itself. Upon that the evidence is all one way in this particular case. We cannot say that the Scotch view is wrong.

(1) 1 H. & M. 105.

Upon these grounds I think that this appeal must be dismissed.

BOWEN, L.J.:—

I take exactly the same view as my learned Brother.

FRY, L.J.:—

I entirely agree.

Solicitors: *Murray, Hutchins, & Stirling; Clarke, Rawlins & Co.*

M. W.

In re RADCLIFFE. RADCLIFFE *v.* BEWES.

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[1890 R. 2050.]

Power—Release of—Tenant for Life—Power to Appoint among Children—Death of Child Intestate—Right to Transfer of Deceased Child's Share—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 52.

A father, who was tenant for life under his marriage settlement, had power to appoint among his children, and in default of appointment the fund was to go to all the children equally, the shares to be vested at twenty-one or marriage. There were issue of the marriage three sons: one died an infant; the other two attained twenty-one; but one of them died a bachelor and intestate. The father took out administration to the last-mentioned son, and executed a deed releasing his power of appointment, and then took out a summons calling on the trustee of the settlement to transfer one moiety to him:—

Held (1.), that the release of the power was valid and that the father was entitled to the son's reversionary interest as his administrator; (2.), that inasmuch as the father's life interest and the son's reversion were held by the father in different rights, there was no merger, and that so long as the father's life interest subsisted the fund ought to remain in the hand of the trustee of the settlement; but (3.) that on the father's executing a surrender of his life interest he was entitled to have one moiety of the fund transferred to him.

Smith v. *Houblon* (1) followed; *Cunynghame* v. *Thurlow* (2) not followed.

THIS was an appeal from a decision of Mr. Justice *North* (3).

By a settlement made on the marriage of the Plaintiff, *J. W. Radcliffe*, in July, 1852, certain property was vested in trustees

(1) 26 Beav. 482. (2) 1 Russ. & My. 436, n.
(3) [1891] 2 Ch. 662.

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upon trust to pay the income thereof to the Plaintiff during his life, and after his death to his wife during her life, and after the death of the survivor of the husband and wife the trustees were to hold the trust property and funds in trust for the child or children of the marriage, as the husband and wife should by deed jointly appoint, and in default of appointment as the survivor of the husband and wife should by deed or will appoint, and in default of appointment in trust for the child or all the children of the marriage, if more than one in equal shares, to be vested interests, in sons at twenty-one and in daughters at twenty-one or marriage.

There are only three children of the marriage, namely, *D. Radcliffe*, *W. F. Radcliffe*, and *B. St. George Radcliffe*.

B. St. George Radcliffe died an infant in 1857; *D. Radcliffe* attained twenty-one, and died a bachelor and intestate in 1881.

W. F. Radcliffe attained twenty-one, and was still alive.

On the 19th of February, 1875, the Plaintiff and his wife appointed a sum of £160 to the son, *D. Radcliffe*, and released their life interests therein. No other appointment was made.

The Plaintiff's wife died in 1878.

On the 9th of July, 1890, the Plaintiff executed a deed poll by which he released and discharged the property subject to the trusts of the settlement from the power of appointment vested in him as the survivor of himself and his wife to the intent that the same power might be absolutely extinguished, and that he might be absolutely excluded from executing the same.

The Plaintiff then took out administration to his deceased son, and called upon the Defendant, who was the surviving trustee of the marriage settlement, to transfer to him a moiety of the trust property; which the Defendant declined to do except under the direction of the Court.

The Plaintiff then took out a summons asking for an order declaring that he was entitled to a moiety of the trust property, and to have the same moiety transferred and paid to him.

Mr. Justice *North* held, that although the release was valid the Court would not in any way assist the Plaintiff in obtaining a transfer of the moiety of the fund.

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The Plaintiff appealed from this decision.

Byrne, Q.C., *Farwell*, Q.C., and *G. P. Lawrence*, for the Appellant:—

The release of the power by the tenant for life was valid, even though it was made for his own benefit: *Smith* v. *Houblon* (1); *Shirley* v. *Fisher* (2); *West* v. *Berney* (3); *Horner* v. *Swann* (4); *Smith* v. *Plummer* (5). Therefore, the Plaintiff is now entitled in possession to his deceased son's moiety. On what principle can the Court refuse to enforce his right? The Court would protect his right if assailed, and when he comes as a Plaintiff he has the same equity: *Hanson* v. *Keating* (6). Mr. Justice *North* decided the case on the authority of *Cunynghame* v. *Thurlow* (7); but in the later case of *Smith* v. *Houblon* a declaration of the rights of the parties was made which was not done in *Cunynghame* v. *Thurlow*, and that case is therefore practically overruled by the later authority (8).

Cozens-Hardy, Q.C., and *Warrington*, for the Defendant:—

The decision in *Cunynghame* v. *Thurlow* has been followed ever since, and is treated as binding in *Sugden* on Powers (9) and

(1) 26 Beav. 482.
(2) 47 L. T. (N.S.) 109.
(3) 1 Russ. & My. 431.
(4) T. & R. 430.
(5) 17 L. J. (Ch.) 145.
(6) 4 Hare, 1.
(7) 1 Russ. & My. 436, n.
(8) Their lordships sent for the record in *Cunynghame* v. *Thurlow*, and ascertained that there was no declaration of the rights of the parties with respect to the fund remaining in the hands of the trustees.

Mr. *Lawrence* stated that he had examined the record in *Smith* v. *Houblon*, and that the order made was as follows:—

"His honour doth declare that in the events which have happened the Plaintiffs *William Henry Smith* and *John Wormald* are entitled to receive the third share of the funds subject to the trusts of the indenture of the 14th day of August, 1833, in the pleadings mentioned which *John Hinde Cotton* in the pleadings named was when living entitled to contingently in default of appointment by and subject to the life interest of his father the Plaintiff, *Alexander Cotton*, but subject to deductions on account of the appointments and advances already made to *John Hinde Cotton*, and an account of the costs, charges, and expenses hereinafter mentioned. And doth declare that the Plaintiffs *Alexander Cotton* and *Maria Cotton* are entitled to receive one third share of the said trust funds. And doth declare that the costs of the Plaintiffs and Defendants in this cause, including any costs, charges, and expenses of the Defendants, are properly chargeable against the share of the trust funds payable to the Plaintiffs *William Henry Smith* and *John Wormald*. [Direction to tax. Liberty to apply.]"

(9) 8th Ed. p. 90.

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Farwell on Powers (1). In *Smith* v. *Houblon* (2) there was no direction to transfer; it is not, therefore, inconsistent with the former case. Although the release may be valid, it was a device to obtain the fund which approached very nearly to a fraud on the power, and the Court will not assist the donee of the power in any way in carrying it into effect. There is no merger of the Plaintiff's life interest and his interest in the reversion as administrator of his son; they are held in different rights, and therefore the trustee's is the proper hand to hold the fund.

Farwell, in reply.

LINDLEY, L.J.:—

This is an appeal from a decision of Mr. Justice *North*. In order to understand the application, it will be necessary that I should state the circumstances under which it is made. It appears that in 1852 a marriage settlement was made which gave the intended husband a life interest in certain property both real and personal. It also gave a life interest to his wife in the same property. She is dead. There was a power to appoint amongst the children of the marriage, and subject to the life interests and to the power of appointment the property was vested in trustees in trust for the children of the marriage, vesting in them on attaining twenty-one. One of them died intestate without attaining a vested interest; two others lived to obtain vested interests. One died intestate having a vested interest, and his father, the Appellant, is his legal personal representative. The wife being dead, the father is equitable tenant for life of the whole property, and he is entitled as legal personal representative of his son to one half of the personal estate subject to the trusts of the settlement. Under those circumstances, the father executed a deed by which he has extinguished his power of appointment, and having extinguished his power of appointment the result is this: that as regards the personal estate, with which alone we have to deal now, he is equitable tenant for life in his own right, and he is entitled as administrator of his son to one half of the reversion in the

(1) Page 356. (2) 26 Beav. 482.

same property. That being the case, he has taken out a summons asking the Court to authorize or to direct the surviving trustee to pay him over half the personal estate to which he is entitled in the way and to the extent I have mentioned. The trustee very naturally declines to do it without the direction of the Court, and Mr. Justice *North* has also declined to interfere, and this is an appeal from his decision.

Now, before I refer to the authorities, I will say one or two words about the principle applicable to the case. The exact position of affairs being that which I have stated, it is obvious that at the present moment, the life estate being vested in the father in one right and the reversion in another right, the two have not merged. In order that there may be a merger, the two estates which are supposed to coalesce must be vested in the same person at the same time and in the same right. Therefore, there is no merger as matters at present stand. The power of appointment is effectually got rid of. There was a time when it was doubtful whether such a power could be released; but all doubt on that point was removed more than fifty years ago, and no doubt can be thrown or ought to be thrown on the doctrine that was then established, even independently of the 52nd section of the *Conveyancing Act*, 1881. The power, therefore, having been got rid of, the only difficulty in principle in assenting to the application of the father is that there is as yet no merger. The difficulty could be got rid of at once by a surrender by the father of his life interest so as to extinguish it, the effect of which would be that the two interests would coalesce, and if there are any creditors the two estates would coalesce for the benefit of the creditors. The father, as the legal personal representative of his son, would then have an estate in possession which would be distributable amongst the son's creditors if there were any, and subject to their payment he would take the property as sole next of kin under the statute. Now, although there has been no surrender, I apprehend there will be no difficulty in the Appellant undertaking to surrender his estate now by counsel at the Bar. If that were done, I cannot see any principle whatever on which we should decline to act upon the state of things which would then exist. It is said that mergers are odious to

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the Court. I do not understand that. The saying only means that mergers are odious if misapplied so as to do injustice; but there is nothing odious in a merger if there is no injustice done. Therefore, I confess, upon principle I cannot see why the Court should decline to accede to the application of the tenant for life provided he removes the technical difficulties which I have suggested by surrendering his life estate.

Then, it is said that there are cases against this view, and that there is an authority of *Cunynghame* v. *Thurlow* (1), which is inconsistent with it. Now, I am not sure that *Cunynghame* v. *Thurlow* was inconsistent with it, because in *Cunynghame* v. *Thurlow* itself there was no equitable merger by reason of there having been in that case what there is here—an estate for life in one right, and remainder in another right, and there was no suggestion in *Cunynghame* v. *Thurlow* that the difficulty could be got rid of by a surrender. But be that as it may, *Cunynghame* v. *Thurlow* has been recognised and acted upon for a great number of years with one very striking exception. The exception to which I refer is the case before the late Master of the Rolls (Sir *John Romilly*) of *Smith* v. *Houblon* (2). Some little ambiguity is thrown upon *Smith* v. *Houblon* by reason of Mr. *Beavan* not having set out the order which was actually made; but Mr. *Lawrence* has been kind enough to supply us with a copy of that order, and it shews that Lord *Romilly's* order went much further than Mr. *Beavan* understood it to go, and did declare that the plaintiff there was entitled to receive from the trustees that which he sought to receive. Those two cases are, to my mind, directly in conflict; and we are at liberty to act upon principle, and to say that notwithstanding *Cunynghame* v. *Thurlow* the Plaintiff is entitled to an order such as he asks. I should hesitate long before I did that if I thought there was the slightest danger of our present decision shaking any title. But, having considered the matter as best I can, and having consulted with my learned Brethren, I am unable to see how any title can be affected or prejudiced in any way whatever.

It appears to me, therefore, that the right order to make is this: to discharge the order made by Mr. Justice *North*, who, I

(1) 1 Russ. & My. 436, n. (2) 26 Beav. 482.

am bound to say, had not his attention called to the mode of getting rid of the difficulty by surrendering the life estate; and, of course, until that surrender is made there is a difficulty and the Plaintiff will not be entitled to the money. But if the Plaintiff has no objection—I do not suppose he has—the order may be drawn up in this form: The Plaintiff by his counsel at the Bar undertaking to surrender his life interest in one moiety of the personal estate, subject to the trusts of the settlement of July, 1852, to the end that the said life interest may merge in the interest in remainder vested in the Plaintiff, as the legal personal representative of his son, declare that the Plaintiff is entitled, as the legal personal representative of his son, to receive from the Defendant, the surviving trustee, the said moiety of the said personal estate, subject to the payment thereout of the costs by the order of the 14th of April, 1891, ordered to be retained, and the costs of all parties to this appeal.

The net result, therefore, of our decision I take to be this: that in a case of this kind the trustees cannot safely pay the money to the tenant for life who simply extinguishes his power: he must do something more—he must surrender his life estate as well. I do not think that was done in *Cunynghame* v. *Thurlow* (1). I can find no trace of it. But if the power is extinguished, and the life estate is surrendered, then the tenant for life's two interests do coalesce, and are vested in the same person at the same time in the same right; and trustees may safely act upon this view in future; and this Court will act upon it now.

BOWEN, L.J.:—

I am of the same opinion. I will only add a few words, as we are differing from the judgment of the learned Judge in the Court below. On the question of principle, first, I would only say that a power of appointment is extinguished by a release has been settled so long ago as the case of *Smith* v. *Houblon* (2). If it was not settled before then, it was certainly settled in the case of *Smith* v. *Houblon*. The release ought, it seems to me, to be

(1) 1 Russ. & My. 436, n. (2) 26 Beav. 482.

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acted upon by the Courts if it is clear that the interests of third parties cannot be affected. But, in order to effect the merger the surrender of the life interest is necessary. If the surrender is effected, and the donee of the power is entitled to receive, and can receive without affecting the interests of any third party in the fund, I can conceive no reason in Law or Equity why the Court should not give effect to the release.

It seems to me that *Cunynghame* v. *Thurlow* (1) may possibly be explained by the existence in that case—although it is not shewn in the reports—of the difficulty to which we have called attention. If so, there is nothing to explain away in *Cunynghame* v. *Thurlow.* But if otherwise, then *Cunynghame* v. *Thurlow* must be modified to the extent which we have mentioned.

FRY, L.J.:—

I am of the same opinion. The matter seems to me to stand in this way: *Cunynghame* v. *Thurlow* and *Smith* v. *Houblon* (2) are, I think, opposed to one another. It is impossible, I think, that the two can stand, and they are really the only authorities which bear in any way directly upon the matter. The only other authority which can be at all cited with any profit seems to me to be the case of *In re Little* (3), where Lord Justice *Cotton* accepted *Cunynghame* v. *Thurlow* as an indication of the mode in which he ought to exercise his discretion. Now, I think that it may well be a recognition of the principle that whilst there is only a release and no surrender, whilst there is no union of the two properties, it may be well or desirable in the Court to retain its hand on the fund. But, beyond that, it appears to me the case is free from authority.

I think, therefore, there being the conflict to which I have referred, we are liberated from the fetter of authority, and are at liberty, and we are therefore bound, to consider this case upon principle. Now, looking at this case in that way, the first question is this: whether a father who has a life interest, and is entitled as legal personal representative of his son, and has not surrendered his life interest, ought to be entitled to call upon

(1) 1 Russ. & My. 436, n. (2) 26 Beav. 482.
(3) 40 Ch. D. 418.

the trustees, or to call upon the Court, to transfer into his hand the fund which it thus holds in two rights. I can see no reason why he should have that transfer. The trustees are appointed for the purpose of taking care of the fund; and, inasmuch as if he receive the fund he would be bound to place himself in the position of a trustee of that fund during the existence of his life interest, I see no reason to substitute the one trustee for the other.

I think, in that state of circumstances, the Court might reasonably and rightly follow the decision in *Cunynghame* v. *Thurlow* (1), and that the trustee in the same manner might reasonably and rightfully decline to hand it over to the father. But where there is not only a release of the power, but the merger of the life interest in the estate, so that the interest in remainder has become an interest *in presenti*, then the father, as the legal personal representative of the son, appears to me to have a present title and a present right to receive the money. There is then no subsisting trust, and there is no reason why the money should any longer remain in the hands of the Accountant General if it is there.

That appears to me to be the right principle to lay down; and, therefore, I agree in the order which has been read by Lord Justice *Lindley*.

Solicitors: *Torr & Co.*, agents for *W. Every, Honiton; Bell, Brodrick, & Gray*, agents for *Bewes, Hellard, & Bewes, Stonehouse, Plymouth.*

(1) 1 Russ. & My. 436, n.

M. W.

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Dec. 18.

In re PAGANI (A PERSON OF UNSOUND MIND). *In re* PAGANI'S TRUST.

Contract by Lunatic before Lunacy—Contract Executed or Executory—Vesting Order—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), s. 135.

M., by writing, agreed to sell his leasehold premises and his business to *T.* and *G.* for a sum of which £2535 was to be paid at once, the residue, £3050, at the end of five years. Possession was given, and the £2535 duly paid. After this *M.*, who resided abroad, was found lunatic abroad, and a curator was appointed, with authority to receive the £3050. *T.* and *G.*, and the curator, petitioned that on payment of the £3050 and interest to the curator the leasehold premises might be ordered to vest in *T.* and *G.*:—

Held, that under the *Lunacy Act*, 1890, sect. 135, an order could be made vesting the leasehold in *T.* and *G.*, such order to be dated and drawn up after payment of the £3050 to the curator.

BY an agreement dated the 18th of April, 1889, *Mario Pagani*, a native of *Switzerland*, agreed to sell to *Tebaldo* and *Giuseppe Pagani* his interest in a lease of No. 48, *Great Portland Street*, with the furniture and tenant's fixtures, and the goodwill of the business there carried on by him, at the price of £5585, of which £2535 was to be applied in paying debts due from *Mario Pagani* in respect of the business, and the balance of £3050 was to be paid at the end of five years, interest at £5 per cent. being paid in the meantime on the 18th of April in each year, and that at the expiration of the five years, if *T.* and *G. Pagani* paid the £3050, and all interest due in respect thereof, and should also have paid all other sums payable by them under the agreement, then *Mario Pagani* would assign to them the premises agreed to be sold.

Possession was forthwith given according to the contract. *Mario Pagani*, in the same year, went to reside in the canton of *Ticino*. *T.* and *G. Pagani* duly applied the £2535 in manner provided by the agreement.

On the 24th of March, 1890, *Mario Pagani* was found by the competent foreign authority to be incapable of managing his affairs; and on the following day a *curator bonis* was appointed by

the municipality of *Torre*, being the Court having jurisdiction in the matter. *T.* and *G. Pagani* paid interest on the £3050 up to the 18th of April, 1891.

On the 25th of February, 1891, the municipality made an order authorizing the curator to recover the £3050, and all interest due on it, and to give a good discharge for the same.

In July, 1891, *T.* and *G. Pagani* and the curator presented a petition *In re Pagani, In re Pagani's Trust, and In re The Lunacy Act*, 1890, praying that on *T.* and *G. Pagani* paying to the curator the £3050 with interest from the 18th of April, 1891, the leasehold premises might vest in *T.* and *G. Pagani* for all the interest of *Mario Pagani* therein.

The Registrar in Lunacy certified the facts of the case to the above effect, and a draft order was prepared reciting evidence of the payment of the £3050, and ordering the property to vest in *T.* and *G. Pagani.*

Farwell, Q.C., and *Amedroz*, for the petition:—

We submit that an order may be made under sect. 135. In *In re Colling* (1) no contract had been entered into by the lunatic, and there was no one to receive the balance of the purchase-money. In the case of *In re Carpenter* (2), there appears to have been no written contract, and whether the heir was bound could not be decided without a suit for specific performance. The present case is like *In re Lowry's Will* (3). Where the purchase-money has been paid to a vendor he becomes a trustee: *In re Cuming* (4), the question being, as there stated, whether there is an executed contract, or whether it remains executory. Here the contract is executed in every respect, except that there has been no conveyance and that a part of the purchase-money is unpaid. If the whole purchase-money had been paid to the lunatic before his lunacy, there could be no question; nor if it had been paid to the curator before the petition; and it can make no difference that the petition has been presented, if the balance is paid to the lunatic before the order, and evidence of payment is recited in the order. There is a legal hand ready to receive the balance,

(1) 32 Ch. D. 333.
(2) Kay, 418.
(3) Law Rep. 15 Eq. 78.
(4) Ibid. 5 Ch. 72.

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and on the payment being made *Mario Pagani* will be a bare trustee.

LINDLEY, L.J.:—

We have here a contract for sale entered into by the lunatic before his incapacity, and so acted upon that a decree for specific performance would be a matter of course. As soon as the £3050 and interest are paid to the curator the lunatic will be a trustee, there being nothing remaining to be done under the contract but to get in the legal estate. I think, therefore, that the order may be made.

BOWEN and FRY, L.JJ., concurred.

Solicitors: *Fladgates.*

H. C. J.

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ROMER, J.
July 28, 29; *Aug.* 8.
C. A.
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Jan. 12, 15.

ALCOCK *v.* SMITH.

[1890 A. 572.]

Bill of Exchange—Overdue Inland Bill indorsed Abroad—Claims by different Holders in Absence of Payer—Indorsee with Valid Title under Foreign Law—Rights against prior Holder with Equitable Title in England—Conflict of Laws—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 29 (*sub-s.* 2), 36 (*sub-s.* 2), 72 (*sub-s.* 2).

A bill of exchange, drawn and accepted by English firms, and payable in *England* to the order of *X. & Co.*, was indorsed in *Norway* by *X. & Co.* to the order of *M.*, who indorsed it in blank and handed it in *Norway* to *S.*, as agent for *A.*, an Englishman residing in *London*, and an English firm of *A. & Co.* carrying on business in *London* (in which *A. & J.* were partners). While the bill was in the hands of *S.*, and still current, it was seized in execution under a judgment obtained in *Norway* by a creditor of *J.*, and, after the bill had become overdue, it was sold by public auction to *M.* The seizure and sale took place in the ordinary course of Norwegian law, under which a perfect title was conferred by the sale on *M.* freed from all equities—that law not recognising the English doctrine that the purchaser of an overdue bill only gets such title as his vendor had, or any difference as to extent of negotiability between a current and an overdue bill. *M.* sold the bill in *Sweden* (the law of which is the same for this purpose as that of *Norway*) to *K.*, who bought in the ordinary course of business, without knowledge of any infirmity of title to the bill. *K.* sent the bill for collection to his agents in *England*, the *N.*

Bank. Before presentation for payment *A.* and *A. & Co.* obtained an *ex parte* injunction restraining the drawers and acceptors from paying the bill, and after presentation *A.* and *A. & Co.* obtained an *ex parte* injunction against the *N. Bank*, restraining them from parting with the bill. By arrangement, the proceeds of the bill were paid into Court, and the *N. Bank* and all the Defendants except *K.* were dismissed from the action:—

Held, by *Romer*, J., that sub-sect. 2 of sect. 36 of the *Bills of Exchange Act*, 1882, which provides, that "where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had," is only declaratory of the English law when that law applies; and that, the action being in reality to recover the bill, the only question being between two persons each claiming against the other to be entitled to hold the bill and as holders to obtain payment, and no question being raised by or affecting the payers, the case was not within the proviso to sub-sect. 2 of sect. 72 of the *Bills of Exchange Act*, 1882, that "where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom:"

Held, by *Romer*, J., and on appeal, that the effect of the transactions in *Norway* must be determined by Norwegian law, and that, as according to that law their effect was to give to *M.* a complete title to the bill and its proceeds free from all equities, the title of *K.* prevailed over that of *A.* and *A. & Co.*

Lebel v. Tucker (1) distinguished.

ARTHUR ALCOCK and *J. Forster Alcock*, domiciled Englishmen and British subjects, were, from 1884 up to the trial of this action, in partnership in the City of *London*, as merchants and shipbrokers, under the firm of "*J. Forster Alcock & Co.*"

In March, 1890, *Arthur Alcock*, being entitled to one-fourth part of a ship, sold the same to the owners of the other three-fourths, who resided in *Norway*, for £800, on the terms that the purchasers should pay off a debt of £300 due to *J. Forster Alcock & Co.*, as the ship's brokers.

Armdt Schiender acted in this transaction as the agent in *Norway* of the vendor, and *Ludvig Meyer* as the agent in *Norway* of the purchasers.

The sums of £800 and £300, making together £1100, were paid, as to the sum of £750, by bills and cash not the subject of this action. The balance of £350 was paid by (1.) a cheque for £235, dated the 8th of March, 1890, drawn by *Galbraith*,

(1) Law Rep. 3 Q. B. 77.

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Pembroke & Co., of the City of *London*, upon the *London* banking firm of *Williams, Deacon, Thornton & Co.*, and payable to the order of *N. A. Andresen & Co.*, of *Christiania*, on demand; and (2.) a bill of exchange for £115, dated the 4th of March, 1890, drawn by *Smith, Ellison & Co.*, bankers, of *Lincoln*, on *Smith, Payne, & Smith*, bankers, of *London*, and payable, fourteen days after date, to the order of *N. A. Andresen & Co.*

The cheque was as follows:—

No. 7348.
£235 0*s.* 0*d.* *London*, 8/3/1890.
On demand pay to the order of Messrs. *N. A. Andresen & Co.*
the sum of Two hundred and thirty-five pounds.
Value received. [Signature of drawers.]
Messrs. *Williams, Deacon, Thornton & Co.*
Bankers,
20 *Birchin Lane*,
London.
In case of need with *International Bank of London, Limited, London.*

Bank of England
a/c
National Bank of Scotland, Ld.
London Office.

The bill of exchange was as follows:—

D.
No. G. G. 9784. £115. *Lincoln Bank,*
Great Grimsby.
4th March, 1890.
Fourteen days after date pay to the order of Messrs.
N. A. Andresen & Co. One hundred and fifteen pounds,
Value received.
(Signed) *Smith, Ellison & Compy.*
To Messrs. *Smith, Payne & Smith,*
Bankers,
London.
In case of need with *International Bank of London, Limited, London.*

Undred and
ity pounds

Bank of England.
a/c
National Bank of Scotland, Ld.
London Office.

N. A. Andresen & Co., on the 11th of March, 1890, indorsed the cheque and bill in the Norwegian language, the translation into English of each indorsement being as follows:—

"For us to pay to Mr. *Ludvig Meyer*, or order, value received. *Christiania*, the 11th of March, 1890."

Ludvig Meyer, on the same day, indorsed both the cheque and bill in blank, and on the 11th of March, 1890, as agent for the purchasers of the share in the ship, he handed the cheque to

Armdt Schiender, as agent for *Arthur Alcock* and *J. Forster Alcock & Co.*

On the same day (11th of March, 1890) *Annæus Schjodt* and others, acting under an order of the Court of first instance of *Christiania*, arrested or distrained in execution the cheque and bill, for a debt alleged to be due, under a judgment of that Court, from *J. Forster Alcock* to *O. C. Bjerke*, and took such cheque and bill out of *Schiender's* possession.

The proceedings in which the arrest was made were as follows: In May, 1883, *O. C. Bjerke* brought an action in the Court of first instance at *Christiania*, against *J. Forster Alcock*, for breach of a contract to purchase and accept certain ice. *J. Forster Alcock* did not appear in this action, as he was advised that the Court had no jurisdiction, and in December, 1883, *O. C. Bjerke's* action against him was dismissed for want of jurisdiction.

In October, 1887, *O. C. Bjerke* appealed from the order of dismissal. *J Forster Alcock* was represented at the hearing of the appeal; and on the 6th of December, 1887, the Court of Appeal reversed the judgment of the Court of first instance, and remitted the action to the latter Court to be heard on its merits.

J. Forster Alcock had notice that the trial was coming on; but, in obedience to instructions sent by him on the 13th of December, 1887, his advocate at *Christiania* did not appear at the trial. The trial took place on the 15th of December, 1887, and before judgment was delivered *J. Forster Alcock* instructed his advocate to apply for a rehearing, and to be allowed to adduce evidence in support of his defence; but the application was refused.

On the 18th of February, 1888, final judgment was given against *J. Forster Alcock* for £240, the full contract price, and costs.

The protocol of distraint, signed by the town Judge at *Christiania*, shewed that after argument by *Schiender*, as advocate for *J. Forster Alcock*, and by *Schjodt*, as advocate for *O. C. Bjerke*, it was resolved that *Bjerke* was, for his claim on *J. Forster Alcock*, better entitled to the cheque and bill.

An appeal lay from this decision; but no appeal was brought.

It appeared from the protocol of auction that, after demand of

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Schjodt, as advocate for *Bjerke*, and public notice of an intended sale of the cheque and bill, and another argument by the advocates of the parties, the auction was directed by the proper official, and took place on the 5th of May, 1890, when both the cheque and bill were knocked down to *Schjodt*, as the only bidder, he acting on behalf of *Meyer*.

An appeal lay from this decision; but no appeal was brought.

There was evidence that the judicial decisions by the Court of first instance, the town Judge, and the auctioneer, were valid so long as they were not reversed or altered by the Superior Court to which they might be appealed, and that so long as reversal or alteration of such decision had not taken place, the person who, according to the decisions and as purchaser at the auction, had come into the possession of the bill and cheque, "must have full opportunity, by virtue of this his title, to dispose of" the same.

At the time when the cheque and bill were taken in execution they belonged to *Arthur Alcock* and *J. Forster Alcock & Co.*, in the proportions of eight-elevenths and three-elevenths, and at the time of the sale by auction both cheque and bill were considerably overdue.

On the 9th of May, 1890, *Ludvig Meyer*, to whom the bill and cheque had been handed, sold them to the *Aktiebolaget Goteborgs Kopmansbank* (bankers at *Gothenburg*, in *Sweden*, and hereinafter called *Kopmansbank*), who purchased the cheque and bill in the regular course of their business, *bonâ fide*, and without actual or positive knowledge or notice of any defect in the title of *Ludvig Meyer*, except such notice or knowledge as might be imputed to them, or they were affected with, by reason of their having taken the cheque and bill after they were overdue, at the then current rate of exchange in *Gothenburg*, for drafts on *London*.

At the date of the sale to *Kopmansbank*, the cheque was eight weeks and six days overdue, and the bill of exchange was six weeks and six days overdue.

L. Meyer delivered the cheque and bill to *Kopmansbank*, who, according to the law of *Sweden* and general custom, impressed on

each document, by means of a stamp, above *L. Meyer's* signature as indorser, words which meant: "Pay to *Aktiebolaget Goteborgs Kopmansbank*, or order, value received."

On the same day *Kopmansbank* indorsed the cheque and bill to the *National Bank of Scotland, Limited* (*London*), (hereinafter called the *National Bank*), or order, and sent the cheque and bill to the *National Bank* for collection.

On the 8th of May, 1890, *Arthur Alcock* and *J. Forster Alcock & Co.* issued their writ of summons in the present action against *Smith, Payne, & Smith*; *Williams, Deacon, Thornton & Co.*; *Annæus Schjodt*, and *Ludvig Meyer*, claiming a declaration that the bill and cheque were the property of the Plaintiffs, and an injunction to restrain *Smith, Payne, & Smith* and *Williams, Deacon, Thornton & Co.* from paying, parting with, or delivering up the bill and cheque to any person other than the Plaintiffs, and to restrain *Annæus Schjodt* and *Ludvig Meyer* from negotiating, or in any way dealing with, the bill and cheque or either of them, and a receiver and damages.

On the same 8th of May, 1890, the Plaintiffs obtained an *ex parte* order restraining *Williams, Deacon, Thornton & Co.* and *Smith, Payne, & Smith*, from paying the cheque and bill.

On the 13th of May, 1890, the bill and cheque, respectively indorsed by the *National Bank*, were presented for payment, which was refused in obedience to the *ex parte* order.

On the same 13th of May, 1890, the Plaintiffs amended their writ of summons by adding the *National Bank* and *Kopmansbank* as Defendants, and claiming an injunction against *Kopmansbank* and their agents, the *National Bank*, to restrain them from parting with, negotiating, or delivering up the bill and cheque, except under the order of the Court.

On the 14th of May, 1890, the Plaintiffs obtained an *ex parte* order restraining the *National Bank* from parting with the cheque and bill, and on the 16th of May, 1890, the Plaintiffs obtained an order directing the *National Bank* to present the bill and cheque, and restraining them from parting with the proceeds except by payment into Court, and pursuant to this order the bill and cheque were presented and paid, and the proceeds were paid into Court. It was admitted that the *National Bank* were

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prevented by the orders of the 14th and 16th of May, 1890, from returning the cheque and bill to *Köpmansbank*.

All the Defendants except *Köpmansbank* were then dismissed from the action, and by their statement of claim the Plaintiffs claimed a declaration that the cheque, bill, and proceeds were the property of the Plaintiffs, and an order for payment to them of the money.

The Plaintiffs in their statement of claim alleged (1) that under the circumstances *Köpmansbank* and the *National Bank* could only take the cheque and bill subject to all defects in the title thereto, and had no title as against the Plaintiffs, who were the true owners; and (2) that the bill and cheque were not only not the property of *J. Forster Alcock*, the alleged debtor under the Norwegian judgment, but that there was not any valid judgment subsisting against him, or at any rate no such judgment as the English Court would enforce.

Köpmansbank, by their statement of defence, alleged that at the time of their purchase of the cheque and bill, *Ludvig Meyer* appeared to be, and was in fact, the holder in due course of the cheque and bill, and that if he was not, or if any other person had or claimed any right or interest therein, *Kopmansbank*, at the time of their purchase, had no notice or knowledge of any such defect of title, right, interest, or claim. They also alleged that the proceedings in the Norwegian action were regular and proper, and that the judgment therein was valid, and such as the English Court would recognise and enforce in this country.

Köpmansbank also alleged as follows: "By the laws of *Sweden* and *Norway* (which laws are in this respect identical, and are, as Defendants contend, applicable for determining the rights acquired by them under their said purchase), the property in the said cheque and bill, and the right to receive and recover in due course for their own benefit the moneys payable thereunder respectively, vested under the circumstances . . . in these Defendants, notwithstanding any defect in the title of the said *Ludvig Meyer*, if such there were, and notwithstanding that the said cheque and bill, or one of them, may have been overdue at the date of the purchase."

The action was tried before Mr. Justice *Romer* on the 28th and

29th of July, 1891, when it was proved that the English rule of law, that the purchaser of an overdue bill is subject to every flaw in the vendor's title, has no counterpart in Swedish or Norwegian law, and that, according to Swedish and Norwegian law, nobody would under the circumstances above stated have a better claim than *Kopmansbank* to the proceeds of the cheque and bill.

Haldane, Q.C., and *Farwell*, Q.C., for the Plaintiffs:—

The bill of exchange is an English bill, drawn and payable in London. It was overdue when offered for sale by public auction, and by English law any subsequent indorsee took subject to any equity attaching to the bill.

By sect. 36, sub-sect. 2, of the *Bills of Exchange Act*, 1882, "Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had."

The cheque is practically in the same position, for "a cheque is a bill of exchange drawn on a banker payable on demand": *Bills of Exchange Act*, 1882, s. 73.

Even a cheque must be presented within a reasonable time; and if that has elapsed, the holder is affected with the equities attaching to the cheque. That the bill was overdue is clear; what is a reasonable time for presenting a cheque is a question for the Court, depending on the circumstances of each case: *London and County Banking Company* v. *Groome* (1). The only point in the transaction which is governed by Norwegian law is as to whether the indorsement was valid. By sect. 72 of the *Bills of Exchange Act*, 1882, "Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto" are determined as follows: (1.) Its validity "as regards requisities in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *suprà* protest, is determined by the law of the place where such contract was made."

(1) 8 Q. B. D. 288.

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After a proviso, which is immaterial in this case, sect. 72 enacts (2) that, "subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *suprà* protest of a bill, is determined by the law of the place where such contract is made; provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the *United Kingdom*." By sub-sect. (3), "the duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured."

Sub-sect. (5), by way of illustration, declares that "where a bill is drawn in one country and payable in another, the due date thereof is determined according to the law of the place where it is payable." All these enactments are merely a consolidation of previously existing law. For instance, *Story* says: "But suppose a negotiable note is made in one country and is payable there, and it is afterwards indorsed in another country, and by the law of the former country equitable defences are let in in favour of the maker, and by the latter such defences excluded; what rule is to govern, in regard to the holder, in a suit against the maker to recover the amount upon the indorsement to him? The answer is, the law of the place where the note was made; for there the maker undertook to pay; and the subsequent negotiation of the note did not change his original obligation, duty, or rights. Acceptances of bills are governed by the same principles. They are deemed contracts of acceptance in the place where they are made and where they are to be performed. So *Paul Voet* lays down the doctrine (1), '*Quid si de literis cambii incidat quæstio; quis locus erit spectandus? Is spectandus est locus, ad quem sunt destinatæ, et ibidem acceptatæ*:'" *Story* on the Conflict of Laws (2).

[ROMER, J.:—That statement accords with sub-sect. 2 of sect. 72 of the *Bills of Exchange Act*, 1882. The sub-section seems to refer to the relative rights of parties to a bill. A more general question is raised here.]

(1) P. Voet de Statut. s. 9, c. 2, n. 14, p. 270, Ed. 1713, Ibid. p. 327, Ed. 1661.
(2) 8th Ed. p. 446, Pl. 317.

Where a bill is payable to order, drawn, accepted, and payable in *England*, the contract of the acceptor is to pay to an order valid by the law of *England*, and the indorsee under such an order can sue in *England*, though the indorsement does not, by the law of the foreign country where the indorser and indorsee are both domiciled and resident, give the indorsee the right to sue in his own name: *Lebel* v. *Tucker* (1). Therefore, the fact that what is done abroad varies the rights of parties there—that is, by the law of the foreign country—does not affect the obligation of the payer in *England;* he is still bound to recognise the equities attaching to an overdue bill by the law of this country.

[ROMER, J.:—But there is no case here of equities as between the payers of the bill and the holders.]

That is so; but the title of the party who takes a negotiable instrument after it is due is affected by the equities existing in favour of another person, and if the latter can shew his prior title in equity, he is entitled to succeed. Suppose a bill indorsed in blank gets into the hands of *A.*, who holds in trust for *B.*, an indorsee taking the bill when it has become overdue takes it at his peril. The negotiability of the bill is ousted as soon as it is overdue; it remained assignable, but only subject to equities.

The indorsement to *Meyer* was good, and the Defendants say he indorsed it to *Kopmansbank;* but in fact he indorsed the bill generally, and handed it to *Schiender* as agent for *Arthur Alcock*, and the arrest was made while it was a going bill; but when *Kopmansbank* took it it was overdue, and they prefixed words to the general indorsement by *Meyer*. His general indorsement, however, had on delivery passed the bill to *Arthur Alcock*, whose equitable rights must prevail here over any title conveyed, according to the law of *Norway*, by what afterwards took place in that country. *Kopmansbank* say they are holders for value; but they are not such holders according to English law. It is by English law that the rights of the parties are to be governed. "Every contract is, in general, to be regulated by the laws of the country in which it is made. For the laws of that country alone are there binding *proprio vigore* on aliens as

(1) Law Rep. 3 Q. B. 77.

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well as on natural born citizens or subjects, and the parties to the contract may generally be taken to have contemplated the legal consequences which those laws deduce from their stipulations. Hence the formalities essential to the validity of the contract, and the interpretation of that contract, are to be governed by the laws of the country where it is made. But . . . where a contract is made in one country to be performed in another, the country where the contract is to be performed is deemed the country in which it was made:" *Byles* on Bills (1). Here the bill was made, and the contract was to pay, in this country. [They also referred on this part of the case to *Trimbey* v. *Vignier* (2); *Hirschfield* v. *Smith* (3); *Schibsby* v. *Westenholz* (4); *Byles* on Bills (5); *Chalmers'* Bills of Exchange (6).]

A second objection to the title of *Kopmansbank* is, that the Norwegian litigation did not prejudice *Arthur Alcock's* rights in the cheque and bill. The transaction between *J. Forster Alcock* and *Bjerke* was a private one, in which *Arthur Alcock* was not concerned. Even if *Bjerke* had the right to arrest the bill and cheque as the property of *J. Forster Alcock*, the judgment of the Norwegian Court will not avail the Defendants in *England*, as it is a case of a foreign tribunal unwarrantably assuming jurisdiction over an absent British subject. Any execution under such a judgment is void.

[ROMER, J.:—You say that the proceeding by way of execution is not a judicial proceeding, taking away any rights of *Arthur Alcock* or his firm; that it was only intended to affect the interest of *J. Forster Alcock*, the defendant in the Norwegian proceedings, and could not prejudice *Arthur Alcock;* that the purchaser at the sale by auction took with notice of their rights; that when *Kopmansbank* purchased the bill it was overdue, and they could not stand in a better position than the man indorsing to them; and that if there was a judgment binding in *Norway* on *Arthur Alcock* and his firm, it is not one on which this Court will act.]

That is our contention. [They were stopped.]

(1) 14th Ed. p. 385.
(2) 1 Bing. N. C. 151.
(3) Law Rep. 1 C. P. 340.
(4) Law Rep. 6 Q. B. 155.
(5) 14th Ed. pp. 386, 387.
(6) 4th Ed. p. 325.

Kennedy, Q.C., and *D. Jones*, for the Defendants:—

This is really an action of trover for the cheque and bill; and the question is, Who is entitled to the documents? At the time they were purchased by *Köpmansbank* they were at *Göthenburg*. As regards personal property, where there is a *res* which is in a foreign country, the law of that country with regard to it, if it is a civilized community, is recognised and acted on by this Court.

[ROMER, J.:—But this is a bill of exchange case. You say a good title can only be given by indorsement. Is not the question as to what is the effect of the indorsement, even though made abroad, governed by English law?]

Only as regards the liability of the acceptor in proceedings against him. The passage cited from *Story* on the Conflict of Laws (1) only applies to the liability of the acceptor, as between himself and the party suing him on the bill. It is his right to say then that the English law applies; but here the acceptor is not concerned.

[ROMER, J.:—Why does not sub-sect. 2 of sect. 36 of the *Bills of Exchange Act*, 1882, bind you?]

Because where there is a conflict of laws, sub-sect. 1 of sect. 72 provides that the validity, as regards indorsement, is determined by the law of the place where the indorsement is made; sect. 36, sub-sect. 2, only applies where there is no conflict of law. This is not a question arising on the bill, but on the title to the bill as a piece of paper or chattel. Cargo is assignable by a bill of lading. Other forms of personal property require special forms of transfer. A bill of exchange is transferred by indorsement and delivery; and the question is, not whether a valid title has been given according to English law, but whether a good title has been given by the law of the country in which the transfer has been made. It has been held in the Exchequer Chamber that if personal property is disposed of in a manner binding according to the law of the country where such property is, that disposition is binding everywhere: *Cammell* v. *Sewell* (2). In that case a cargo was shipped in *Russia*, by a Russian agent for

(1) 8th Ed. p. 446, Pl. 317. (2) 5 H. & N. 728, 744; 29 L. J. (Ex.) 350.

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an English merchant resident in *England*, on board a Prussian vessel, which was wrecked on the coast of *Norway*. The cargo was saved and sold. By the law of *Norway*, though the captain might not be able to justify the sale as between himself and the cargo-owners, an innocent purchaser took a good title, which prevailed, when the cargo was afterwards brought to *England*, over that of persons claiming through the cargo-owners. The principle of that case has been frequently recognised, and has been applied to the case of a transfer of American bonds, good according to the law of the country where the transfer was made: *Williams* v. *Colonial Bank* (1), and to the case of a policy of life insurance granted by an English company, and assigned by the assured by an instrument which was valid according to English law, but invalid by the law of the colony in which he was resident and domiciled, the assignment in that case being held to be inoperative: *Lee* v. *Abdy* (2). The question is not whether certain sections of the *Bills of Exchange Act*, 1882, refer to such a case, but whether that Act applies at all where the foreign law differs from the English law—and we say the Act was never intended to overrule the private international law on the subject. Nor do the authorities cited for the Plaintiffs support their contention. The passage cited from *Story* on the Conflict of Laws only refers to the liability of the acceptor as between himself and a party suing on the bill. It is not necessary for the Defendants to argue that, as against the acceptor, we could gain greater rights by the law of *Norway* than are possible under the law of *England*. *Lebel* v. *Tucker* (3) only decides that when a bill is accepted in *England* the contract of the acceptor is to pay according to the law of *England*. In *Bradlaugh* v. *De Rin* (4), when the case was before the Court of Common Pleas, there was a division of opinion as to the soundness of the *dicta* in *Lebel* v. *Tucker*, *Bovill*, C.J., and *Willes*, J., not being satisfied with the *dictum* on which the Plaintiffs here rely, whereas *Montague Smith*, J., was of the contrary opinion (5). *Bradlaugh* v. *De Rin* was reversed in

(1) 38 Ch. D. 388, 403; 15 App. Cas. 267.
(2) 17 Q. B. D. 309.
(3) Law Rep. 3 Q. B. 77.
(4) Ibid. 3 C. P. 538.
(5) Ibid. 3 C. P. 543, 545.

the Exchequer Chamber, but only on the question of French law involved—a question of fact—it being held that the law of *France* did not prevent the plaintiff from suing the acceptor in that country (1). That was an intermediate case, the acceptance being English, but the drawing and indorsing being in *France*. The effect of the cases is summed up in *Foote* on Private International Jurisprudence (2). The effect of sub-sect. 2 of sect. 72 of the *Bills of Exchange Act*, 1882, is to codify what is laid down in *Lebel* v. *Tucker* as to the liability of the acceptor to pay only to the indorsee whose title is good, according to English law. in proceedings against the acceptor by such indorsee. But here the acceptors have voluntarily paid, without being sued on the bill for the money, and the case is outside the authorities as to bills of exchange specially. The question is, Did *Kopmansbank* acquire property in the bill as a chattel, having become, under Norwegian and Swedish law, holders of the bill, and thus acquired property in the document? [They also referred in support of this part of their argument to *Horne* v. *Rouquette* (3).] The judgment of arrest was a judicial decision, and the sale by auction gave the purchaser a sort of title in market overt. An appeal lies from such a decision; and *J. Forster Alcock* had an opportunity of appealing of which he did not avail himself. He had proper notice of all proceedings; he was duly represented, and his legal representative retired by his express directions. The judgment in the Norwegian proceedings was valid, and obtained fairly, and generally under such circumstances that it should be recognised by an English Court. The purchaser obtained a good title, and *Kopmansbank* purchased for value, and without notice, in the ordinary course of their business.

Haldane, in reply:—

No doubt on a transfer of ordinary moveable property the *lex loci* decides whether the transfer is valid; but the rule as to bills of exchange is different, because the effect of passing the bill is to create a new contract with the acceptor, and to put bills of exchange on a special footing. In *Lee* v. *Abdy* (4) the difference

(1) Law Rep. 5 C. P. 473.
(2) 2nd Ed. pp. 438-440.
(3) 3 Q. B. D. 514.
(4) 17 Q. B. D. 309, 314.

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was judicially noticed. Mr. Justice *Wills*, referring to *Lebel* v. *Tucker* (1) and *Bradlaugh* v. *De Rin* (2), says, that "the principle which may be deduced from those decisions with regard to the law which governs the indorsement of negotiable instruments" "would hardly apply to the case before us"—a transfer in a colony of an English policy of assurance—"It is not like the case of a bill of exchange."

[ROMER, J.:—Is this a case against the payers? If they had been sued by *Kopmansbank*, what defence would they have had?]

It would have been a good defence that they were liable to pay only to the persons to whom the money was payable according to English law. The acceptors would be concerned in the question, who is the person to whom payment is to be made? In *Williams* v. *Colonial Bank* (3), Lord Justice *Cotton* distinguishes between the title to the certificates and the title to the shares. Sect. 29 of the *Bills of Exchange Act*, 1882, says that "A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions; namely, (*a*) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact: (*b*) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it." But the Defendants say that "holder" means the manual holder, who is not holding in due course. Sect. 59 shews how a bill is discharged, viz., by "payment in due course," which is defined by the same section as "payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective."

[*D. Jones* referred to sect. 2, which says that, unless the context of the Act otherwise requires, "'Holder' means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof."]

The effect of sects. 29, 56, and 59, is that the acceptor may safely pay a holder in due course.

(1) Law Rep. 3 Q. B. 77. (2) Law Rep. 3 C. P. 538.
(3) 38 Ch. D. 388, 399.

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It is common ground that the case of the cheque cannot be distinguished (at any rate, in the interests of the Plaintiffs) from that of the bill of exchange, and I therefore, in the following remarks, deal only with the bill, though my judgment covers both.

For the purposes of the legal points arising here, the facts may be shortly stated as follows: An English bill, drawn by and upon English firms and payable to the order of *Andresen & Co.*, is indorsed by *Andresen & Co.* to the order of one *Meyer*, who indorses it in blank and hands it in *Norway* to *Schiender*, as agent for the Plaintiffs, for valuable consideration. While it is in the hands of *Schiender* it is seized under the Norwegian law by the local official, whose duty it is to do so, in respect of a judgment obtained in *Norway* by a creditor there against *J. Forster Alcock*, a partner in the plaintiff firm of *J. Forster Alcock & Co.* *Schiender*, who is not only agent of, but also acts as advocate in *Norway* for, the Plaintiffs, protests on their behalf against the seizure, and the officer who seized, and who appears to be endowed by the Norwegian law with power as judge to decide the points, hears the arguments, *pro* and *con*, of *Schiender* for the Plaintiffs, and of the representative of the judgment creditor, and decides, in favour of the latter, that the seizure is valid. The Plaintiffs do not appeal from this, though they could have done so. Then, after the lapse of some months and in accordance with the usual course of Norwegian law, as the decision of the officer who seized stands, the bill is sold by public auction. That sale was by an official (who appears also to have judicial powers), after first hearing arguments on behalf of the parties and deciding for the sale against the Plaintiffs, who do not appeal, as they might, from his decision. The effect of this was that by Norwegian law the sale was perfectly valid and conferred a perfect title to the bill on the purchaser, freed from any claims by the prior holder, *Schiender*, or his principals, the Plaintiffs, and this notwithstanding that the bill was overdue at the date of the sale. Indeed, by Norwegian law, the purchaser for value, in the absence of fraud, of an overdue bill, takes it freed from all equities—that law not recognising the English doctrine that the purchaser of an overdue bill only

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gets such title as his vendor had, or any difference as to extent of negotiability between a current and an overdue bill. After this the purchaser at the sale sells the bill in *Sweden* (the laws of which country are the same for this purpose as those of *Norway*) to the Defendants, *Kopmansbank*, who buy in the ordinary course of business, without knowledge of any infirmity of title to the bill, and in reliance on their own law, under which they acquired a perfect title to the bill as *bonâ fide* holders for value, and as if the bill were current and not overdue. Then *Kopmansbank* send the bill for collection to their agents in *England*, the Defendants, the *National Bank of Scotland, Limited.* Before the bill can be presented and paid, the Plaintiffs, who, beyond protesting at and before the sale, had stood by, and taken no proceedings in *Norway* or *Sweden* to assert their alleged rights, commence this action, and obtain an *ex parte* order restraining the English drawers and acceptors of the bill from paying it—and consequently when the bill is presented it is not paid; and then the Plaintiffs obtain an *ex parte* order restraining the *National Bank of Scotland* from parting with the bill. Ultimately, it being of course a matter of indifference to the drawers and acceptors of the bill to which of the contending parties they pay, an arrangement is made by which the amount of the bill is paid by them and brought into Court, and they are dismissed from the action; and now the action comes on to decide to whom the proceeds of the bill belong, having regard to the facts above mentioned, about which there is no substantial dispute.

In the first place, it is to be noted that the action is in reality one for recovery of the bill—a mere question as between two parties, each claiming against the other to be entitled to hold the bill, and as holders to obtain payment thereon. It is not a case affecting the drawers or payers on the bill; no question is raised by them. This action, indeed, appears to me to be in the same position as if the Plaintiffs were simply suing *Kopmansbank* to have the bill in their possession handed over to the Plaintiffs.

Now, there is one point on which the Defendants rely, and with which I proceed to deal; for if that is decided in favour of the Defendants, *Kopmansbank*, it is fatal to the Plaintiff's case, and I need not consider the other points raised by such Defendants.

That point is this: The Defendants say that though the bill was an English bill, yet, inasmuch as it was transferred in *Norway* and *Sweden*, the law applying in both those countries must govern the question whether by the transfers a good title was acquired freed from any equities in favour of the Plaintiffs, or only a title subject to such equities, especially as this is not a case affecting the drawers or acceptors, but only one between former and present holders, who were parties to or bound by the transfers in *Norway* and *Sweden*. On the other hand, the Plaintiffs say that, though the transfers were in *Norway* and *Sweden*, and though *Köpmansbank* bought in the latter country, the bill, in the ordinary course, and according to the law of their country, and without knowledge of any defect in title to the bill or of any rights of the Plaintiffs, yet the English law applies, and the legal effect of the transfer is to be ascertained by English law; and that, inasmuch as the bill was overdue when bought by *Köpmansbank*, and when bought by their vendor at the sale by public auction, those parties respectively acquired the bill subject to the rights thereto of the Plaintiffs, which, they say, had not been divested by the sale, because that sale ought not to be recognised as valid in this country, against them, having regard to the circumstances attending it. Which law, then, does apply—Norwegian or English? I think Norwegian, bearing in mind that this is merely a question between holders of a bill, and not one concerning the contracts of the drawers or acceptors, or one raised by or affecting them.

Generally, the rights of transferor and transferee on a transfer, in one country, of a document of title to a debt or to an interest in personal property, are governed by the law of the country where the transfer takes place, although the debt may be due from persons living in, or the personal property may be situate in, a foreign country. For instance, in *Williams* v. *Colonial Bank* (1), certificates of shares in an American railroad were dealt with in *England*, and it was held that questions as to the rights of the parties to the dealing, including questions as to whether the certificates were to be treated as negotiable securities or whether the persons taking them were put on inquiry, were to

(1) 38 Ch. D. 388; 15 App. Cas. 267.

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be dealt with according to English law, and not according to American law. So in *Lee* v. *Abdy* (1), where the validity and effect of an assignment, in *Cape Colony*, of an English company's policy of insurance, came to be considered, it was held that the law of *Cape Colony* applied, and not the English law. Indeed, the question here being legally only as to the right to hold the bill (the document itself) as between claimants not parties to the bill, the case is not different from that of a sale in *Norway* or *Sweden* of chattels there, which would, in the absence of fraud, be governed by the Norwegian law notwithstanding the claims of English people, not parties to the sale, who were interested in or claimed title to the chattels sold: see *Cammell* v. *Sewell* (2), where goods were being carried on a ship (not Norwegian) from *Russia* to *England*, the goods being shipped to an English merchant, to whom they belonged, by his agent in *Russia*, and, the ship being wrecked in *Norway*, the goods were sold there by the captain of the vessel under circumstances which gave the purchaser a good title to the goods by Norwegian law, but not by English law; and it was held that the Norwegian law applied, and not the English law, and that when the goods subsequently came to *England*, the true owner by English law could not claim them against the purchaser claiming under the sale in *Norway*.

But then it is said, for the Plaintiffs in this case, that bills of exchange form an exception to the general rule, and, though dealt with abroad, are, if English bills, governed by English law. I know of no principle on which such an exception to the general rule can be based. And, indeed, the Plaintiffs' counsel did not argue the point on principle, but said the case was governed by *Lebel* v. *Tucker* (3), to which I will hereafter more particularly refer. But, on authority, I think it is clear that bills of exchange form no such general exception to the rule as urged: see sect. 72 of the *Bills of Exchange Act*, 1882, sub-sect. 2, which provides (*inter alia*) that the interpretation (by which I understand is meant the legal effect) of the indorsement of a bill is determined by the law of the place where it takes place, the only exception being one in favour of the rights and liabilities of the payer

(1) 17 Q. B. D. 309. (2) 5 H. & N. 728, 744; 29 L. J. (Ex.) 350.
(3) Law Rep. 3 Q. B. 77.

alone in the case of an inland bill indorsed in a foreign country; and see the observations of the Judges in the case of *Horne* v. *Rouquette* (1).

I then come to deal with the case of *Lebel* v. *Tucker* (2), above referred to. I do not pause to consider whether on principle that case was rightly decided—though it has been questioned, and seems hardly consistent with a later case (3)—for it has been made law, if it was not so before, by the proviso in sect. 72, sub-sect. 2, of the *Bills of Exchange Act*, 1882, creating the exception in favour of the payer of the bill to which I above alluded. But what did that case decide? Only this—that so far as concerns the payer of an English bill payable to order, indorsed abroad, his contract is to pay to an order indorsed, valid by the law of *England*, and that he is liable to an indorsee when the indorsement, though made in *France* and invalid by the law of that country, is valid by English law. That case is no authority on the point now before me. I have not to consider the effect of any indorsement on the rights or liabilities of the payer. If *Kopmansbank*, as holders of the bill, had presented it for payment to the payers in the present case, the latter could safely, and would, have paid the bill to that bank in ordinary course, had not the Plaintiffs obtained the *ex parte* injunction they did (see sect. 59 of the above Act, and the definition of "holder" in sect. 2); and it is clear, and indeed was admitted by the Plaintiffs' counsel, that the obtaining of the injunctions in this case, and the payment into Court of the proceeds of the bill, have not interfered with the respective rights of the Plaintiffs and *Kopmansbank*, but have left the action for present purposes where it stood, as an action by the Plaintiffs against the bank, seeking to have the bill handed over to the Plaintiffs as the true owners of that document as against the bank.

Lastly, it was said for the Plaintiffs that sect. 36, sub-sect. 2, of the above Act governed the case. But that section appears to me only declaratory of the English law where that law applies, and, if I am right in the conclusions I have come to—that the rights of *Kopmansbank* to be considered as true holders of the

(1) 3 Q. B. D. 520, 521, 522. (2) Law Rep. 3 Q. B. 77.
(3) *Bradlaugh* v. *De Rin*, Law Rep. 3 C. P. 538.

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bill, freed from the Plaintiffs' claims, by the Norwegian and Swedish transactions, are governed by the law applying in both those countries—then the section of the Act has no application.

It follows that, in my judgment, the case fails on the above grounds, and I need not consider the further points raised by *Kopmansbank*. I must dismiss the action as against the continuing Defendants, and with costs so far as concerns those Defendants who appeared at the trial, and must order the proceeds of the bill in Court to be paid out to *Köpmansbank*.

F. E.

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The Plaintiffs appealed from this decision. The appeal came on for hearing on the 12th of January, 1892.

Haldane, Q.C., and *Farwell*, Q.C., for the Appellants:—

The decision of the local officer in *Norway* was not judicial. He was only in the position of an auctioneer, and had no authority to determine the rights of the parties. Therefore, there is no judicial decision binding on the Court, and this question must be considered quite independently of what took place when the bill was sold. The question is, whether the law of *England* or of *Norway* is to govern. We submit that as it was an English bill, the law of *England* must govern, and those who took it when overdue took it subject to the equities affecting it. Our rights depend upon the contract between us and the acceptor; and they must be decided according to the law of the country where the contract was made: *Lebel* v. *Tucker* (1); *Gibbs* v. *Société Industrielle des Métaux* (2); *Bradlaugh* v. *De Rin* (3); *Smallpage and Brandon's Case* (4); *Lee* v. *Abdy* (5). Even if the decision of the local official in *Norway* is to be regarded as a judicial decision, it is not conclusive as to the right to the proceeds of the bill. The sale only passed the interest of *A. Alcock*. It was only in the nature of an execution; it could not affect us, as we were no parties to the proceedings.

(1) Law Rep. 3 Q. B. 77.
(2) 25 Q. B. D. 399.
(3) Law Rep. 3 C. P. 538.
(4) 30 Ch. D. 598.
(5) 17 Q. B. D. 309.

[KAY, L.J.:—Can you refer to any authority in your favour as to the effect of an indorsement abroad being determined according to English law?

LINDLEY, L.J.:—Had this not been an inland bill, sect. 72 of the *Bills of Exchange Act*, 1882, would have put you out of Court.]

The case of an assignment of a bond debt furnishes an analogy; its effect is determined by English law, though it takes place out of *England*: *Jeffery* v. *M'Taggart* (1). This being an English bill drawn and payable in *England*, it forms a contract governed by English law.

[KAY, L.J.:—Is not the taking an overdue bill, subject to prior equities, an incident to the indorsement, which is here a foreign transaction?]

No; in *In re European Bank* (2), Lord Justice *Giffard* says it is "an equity attaching directly to the bills." In *Castrique* v. *Imrie* (3), it is laid down that a tribunal decides only the rights of the parties before it, and does not determine the rights of third parties. Here, then, the proceeding in *Norway* could not prejudice the rights of *Arthur Alcock;* and the case of *Cammell* v. *Sewell* (4) is explained by *Castrique* v. *Imrie; Simpson* v. *Fogo* (5), the substance of which is stated in *Castrique* v. *Imrie*, is against the barring *Arthur Alcock's* rights by the sale in *Norway*. To be entitled to payment of an English bill a holder must be a lawful holder according to the law of *England: Bradlaugh* v. *De Rin* (6). There is only one original contract, and the contracts between the indorsees are contracts of indemnity: *Horne* v. *Rouquette* (7).

Kennedy, Q.C., and *D. Jones*, for *Kopmansbank*:—

The Appellant must shew that there was an infirmity in *Meyer's* title, and that such infirmity affects *Kopmansbank*. *Lebel* v. *Tucker* (8) is out of the way, for it was an action on a

(1) 6 M. & S. 126.
(2) Law Rep. 5 Ch. 358.
(3) Ibid. 4 H. L. 414, 427.
(4) 5 H. & N. 728, 746.
(5) 1 J. & H. 18; 1 H. & M. 195.
(6) Law Rep. 3 C. P. 538; Ibid. 5 C. P. 473.
(7) 3 Q. B. D. 514, 518.
(8) Law Rep. 3 Q. B. 77.

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bill of exchange against the acceptor; the present is merely an action between indorsees to determine which of them is entitled to the bill, and the proviso in the *Bills of Exchange Act*, 1882, sect. 72, sub-s. 2, does not apply.

[LOPES, L.J.:—There is authority in favour of the proposition that a transfer abroad of a document of title is governed by the law of the place of transfer. Is there any authority the other way?]

We are not aware of any, and the proposition is supported by *Williams* v. *Colonial Bank* (1); *Cammell* v. *Sewell* (2); *Lee* v. *Abdy* (3). *Story* on Conflict of Laws (4) applies only to the liability of the acceptor. There is no evidence to shew that *Meyer's* title was defective; the evidence that the Norwegian proceedings conferred according to Norwegian law a good title to the bill is uncontradicted; and *Kopmansbank*, being entitled to the bill, are entitled to the money payable under it.

Haldane, in reply:—

As regards the nature of the case, I contend that this is substantially an action against the acceptor. The question to be decided is, whom was the acceptor bound to pay? Looking at the case in this light, *Lebel* v. *Tucker* (5) is an authority in our favour, for it decides that the acceptor must pay a person who is a good indorsee according to the law of *England*. The Respondents rely on *Williams* v. *Colonial Bank*; but that case leaves open the effect of the right to possession. By sect. 72 the liability of the acceptor to pay is governed by the law of *England*. The passage in *Story*, if we read on, supports the Appellant's case. There was here no judgment *in rem*: *Cammell* v. *Sewell* (6); *Castrique* v. *Imrie* (7). A foreign judgment must be final or it will not be regarded by our Courts: *Nouvion* v. *Freeman* (8). The Norwegian proceedings did not decide the rights; there was nothing but a disposition of the *res*, as in

(1) 38 Ch. D. 388, 403; 15 App. Cas. 267, 272.
(2) 5 H. & N. 728.
(3) 17 Q. B. D. 309.
(4) 8th Ed. pp. 317, 446.
(5) Law Rep. 3 Q. B. 77.
(6) 5 H. & N. 746.
(7) Law Rep. 4 H. L. 414, 427.
(8) 37 Ch. D. 244; 15 App. Cas. 1.

Cammell v. *Sewell* (1), and that decided nothing between the Plaintiffs and *Kopmansbank*.

LINDLEY, L.J.:—

The question in this case is which of two persons is entitled to a sum of £350, being the produce of a certain cheque for £235 and a bill of exchange for £115. It will not be necessary to draw any distinction between the cheque and the bill, and, therefore, I will allude only to the bill.

The bill was drawn in the English language in *England* by an Englishman named *Ellison* on Messrs. *Smith, Payne, & Smith*, of *London*, bankers, and was made payable in *London*. It was drawn to the order of Messrs. *Andresen & Co.*, who were merchants in *Christiania*, in *Norway*. The history of the bill is this. It was indorsed by Messrs. *Andresen* to a Mr. *Meyer*, and it was on the 11th of March indorsed by Mr. *Meyer* in blank, and was given by him to a gentleman of the name of *Schiender* for *Arthur Alcock* and the firm of *J. F. Alcock & Co.*, which last firm consisted of *John Forster Alcock* and *Arthur Alcock*. It is important to bear in mind that it was a bill which, as it then stood with *Meyer's* indorsement upon it, was a negotiable instrument transferable to bearer. The *Alcocks* then held it by their agent *Schiender*. In that state of things, under a judgment obtained in *Norway* against Mr. *John Forster Alcock*, one of the judicial officers or ministerial officers in *Norway* (a person whom I will allude to for the sake of shortness as a sheriff) seized in execution, according to the law of *Norway*, this bill indorsed as it was, and sold it in accordance with the law of *Norway*. It was bought by a person of the name of *Schjodt* for *Meyer*, and, on the 9th of May, *Meyer* sold it to *Kopmansbank*. It did not require any further indorsement, because it was sold as a negotiable instrument payable to bearer, and was bought by *Kopmansbank* as a negotiable instrument payable to bearer; and they bought it in the ordinary course of business *bonâ fide* and for value. At that time the bill was unquestionably overdue. One point which we have to consider is, what was the effect of the purchase by *Kopmansbank* of this bill in its then state and under the circumstances

(1) 5 H. & N. 728.

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I have mentioned, bearing in mind that it was an overdue bill of exchange? Now, according to Mr. *Schiender's* evidence, which is not contradicted or disputed, it is plain that, under the law of *Norway*, the judicial sale of that negotiable instrument "transferable to bearer" (a circumstance to which I attach great importance) conferred a good title upon the purchaser. It is also proved by the other evidence that, according to the law of *Norway*, a person who *bonâ fide* purchases for value a bill of exchange, which bill is overdue, is not affected in regard to title as he would be affected by the law of *England*.

That being the state of things, and *Kopmansbank* having become the holders of that bill for value, I proceed to consider whether they are or are not entitled to recover and hold for themselves the money represented by the bill. It has been argued by Mr. *Haldane* and Mr. *Farwell*, that inasmuch as this was an inland bill transferred to them when it was overdue, although it was taken *bonâ fide*, they took it subject to all equities affecting the bill, and they say that *Kopmansbank* could not maintain an action in respect of that bill against the acceptor of it. That argument is based upon the fact that this was an English bill, and upon the combined operation of the *Bills of Exchange Act*, s. 72, sub-s. 2, which I will read presently, sect. 36, sub-sect. 2, and sect. 29, sub-sect. 2. Now, it is impossible in applying those sections to this bill and to the title of *Kopmansbank* to ignore the fact that they acquired their title under the judicial sale, and if due effect is given to that then it seems to me that, even looking at the matter in the narrowest possible point of view, *Kopmansbank* are entitled to recover this money from the acceptor.

Now, I will go through the sections with reference to the arguments which have been addressed to us. Sect. 72 of the *Bills of Exchange Act* relates to the conflict of laws, and the first part of it does not apply, but sub-s. 2 runs thus: "Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made. Provided that where an inland bill"—as this is—"is indorsed in a foreign country"—as this was—"the indorsement shall as regards the payer"—which I read as the acceptor—"be interpreted according

to the law of the *United Kingdom.*" Now, this bill was indorsed in such a way, as it appears to me, that the indorsement was effectual whether you interpret according to English law or according to any other law. Then sect. 36, sub-s. 2, is important, because, treating this as an English bill covered by English law, it is applicable. Sub-sect. 2 says this: "Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had." That is to say, if you take an overdue bill you take it subject to any defect of title in the person from whom you got it. That gives rise to the question, Was there any defect in title in *Meyer*, from whom *Kopmansbank* got it? That must be considered. But *Meyer* got it under the judicial sale, and there was no defect at all. Now, "defect of title" is a phrase introduced into the *Bills of Exchange Act* in lieu of the old expression "subject to equities," which is an expression not adopted because the Act applies to *Scotland* as well as to *England*, and "subject to equities" is an expression not known to Scotch law. Sect. 29, sub-sect. 2, says: "In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." The present case clearly does not come within those words. The only possible words under which it could come would be "or other unlawful means." But the means by which *Meyer* got the bill were not unlawful; they were lawful according to the law of the place where the transaction took place. Therefore, putting the case in the light most favourable to the Appellants, *Kopmansbank* have a good title to this bill and the money represented by it, treating it as an English bill and applying the provisions of the *Bills of Exchange Act*, having regard, of course, to what took place in *Norway*.

Now, if that is so, we have only further to consider whether there are any equitable grounds for depriving those gentlemen

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of the money to which they have become entitled. The Appellants put their case very forcibly in this way, that the judicial sale of the bill was subject to the claim of *Arthur Alcock* to eight-elevenths of this money; but how can that equity attach to a bill indorsed in blank, and so transferable to bearer? That may be a question between themselves, but it does not affect any person taking the bill. The bill is taken simply with notice that the sheriff, as I have called him, was selling. Now, what did the sheriff sell? He did not sell the bit of paper merely, but he sold the bill—that is to say, he sold the benefit of the contract represented by the paper which he handed over. What was that benefit, and what was the contract? The contract on the part of the acceptor was to pay the bill to the lawful holder. That is said to mean, the lawful holder according to the law of *England*. I agree. But we must not ignore what took place in *Norway*. The argument on the part of the Appellants is that we ought to shut our eyes to the mode and circumstances under which *Meyer* got the bill. If the mode and circumstances under which he got it were such as to give him a title in *Norway*, not only to the bill but to the benefit of the contract, then *Köpmansbank* are the lawful holders by the law of *England*, and there would be no defence to an action. The equity is displaced by the very same reasoning. You cannot enforce the equity as against the *bonâ fide* holder of a bill which is transferable to bearer, and of which he is the lawful holder.

With reference to the authorities, I do not think I need say much. The strength of the Plaintiffs' case is that this was an overdue bill with notice of the defect in title. The answer is that there is no defect of title, and therefore there is nothing for the holders to have notice of. The cases of *Lebel* v. *Tucker* (1), *Lee* v. *Abdy* (2), and *Bradlaugh* v. *De Rin* (3), do not appear to me to touch this case at all. We are asked to say on the authority of those cases that the Court is to ignore a title which is good according to the law of the country where the bill has been sold. Those cases lay down no such principle. The difficulty of the Appellants in this case arises from the fact that

(1) Law Rep. 3 Q. B. 77. (2) 17 Q. B. D. 309.
(3) Law Rep. 3 C. P. 538; Ibid. 5 C. P. 473.

Alcocks, though they had been the lawful holders of the bill, had ceased to be so by the law of *Norway*. *Lebel* v. *Tucker* (1) does not touch that, nor do any of the cases which have been referred to come near it.

On those short grounds, treating this to the fullest extent as a bill overdue when bought, and assuming that *Kopmansbank* are supposed to have had notice of any defect of title, the fact that there was no defect of title is a complete answer both at law and in equity. Therefore, I am of opinion that the learned Judge in the Court below in this case was quite right, and that this appeal must be dismissed with costs.

LOPES, L.J.:—

I fully agree with what has been said by my Brother *Lindley*, and I have very few words to add. It must be observed, and I think it most material, that *Kopmansbank* are innocent holders. They are *bonâ fide* holders for value. Again, I think it is important in the onset to observe that this was a bill indorsed in blank, and therefore payable to bearer. Starting with those two propositions, it appears to me that in whatever way this case is looked at the judicial sale determines the case. Evidence has been brought to our notice which was given at the trial—evidence given by a Norwegian advocate, an expert in the law of the country. That evidence amounts to this, that a judicial sale such as took place in this case gives an absolute title in *Norway* to the bill and to the proceeds of the bill; not only is the property in the paper transferred by such a sale, but the right to receive the money, the bill itself, the paper of the bill, is transferred, and the money secured by it passes to the purchaser.

Now, that was the evidence given with regard to the state of the law in *Norway*, and that evidence was not contradicted in any way. In point of fact, it came from a witness called by the Plaintiffs themselves. He was cross-examined, what I have stated was obtained from him, and he was not re-examined by the Plaintiffs' counsel. Therefore, I am entitled to say that it is an undisputed fact in this case that the law in *Norway* is such as was stated by the Norwegian advocate who was called.

(1) Law Rep. 3 Q. B 77.

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Now, that being so, what are the rights as between the transferor of this bill and the transferees? What does the transfer amount to? It is a transfer in *Norway* of the document of title to a debt. By what law is such a transfer to be governed? It appears to me the law is clear that such a transfer is to be governed by the law of the country where the transfer takes place. That in this case would be Norwegian law.

Now, what is the law of *Norway*? It is undisputed that by the law of *Norway* overdue and current bills stand on the same footing, or, in other words, in the case of an overdue bill no equity attaches; and it was admitted by Mr. *Haldane* that if this had been a Norwegian bill the title of *Kopmansbank* would have been perfect. The Plaintiffs, therefore, can set up no equity against the Defendants even if an equity exists.

Therefore, in the result, I come to the conclusion that the Defendants *Kopmansbank* are the lawful holders of this bill, and I can see no infirmity of title, and no other title which exists in that bill.

With regard to the cases that have been cited, for the reasons given by my Brother *Lindley*, I am of opinion that they do not touch this case. I think, therefore, that the decision of the learned Judge in the Court below was right, and that this appeal must be dismissed.

KAY, L.J.:—

The material facts in this case are as follows: In 1884 *Arthur Alcock* and *John Forster Alcock* became partners as merchants and shipbrokers. In March, 1890, *Arthur* sold certain shares in a ship which were his separate property, but upon which his firm had a claim of £300 for brokerage. The purchasers, *Andresen & Co.*, are resident in *Norway*, and were the owners of the other shares in the ship. The terms of the sale were that they should pay to *Arthur* £800, and should pay the £300 to his firm. The payment was made partly in cash and partly by bills and cheques. One of such bills and one cheque are the subjects of the present action. No distinction is made between the bill and the cheque for the purpose of the question to be decided. The cheque was dated the 8th of March, 1890, drawn by

Galbraith & Co., of *London*, upon *Williams, Deacon & Co.*, of *London*, bankers, payable on demand to *Andresen & Co.*, merchants in *Norway*, or order. The bill was dated the 4th of March, 1890, drawn by *Smith, Ellison & Co.*, of *Lincoln*, upon *Smith, Payne, & Smiths*, bankers, *London*, payable to *Andresen & Co.*, or order, fourteen days after date. *Andresen & Co.* indorsed both the cheque and bill in *Norway* to *Meyer*. *Meyer*, before they were overdue, indorsed both in blank, and handed them to *Schiender* in *Norway*, who received them as agent for *Arthur Alcock* and for his firm. The proceeds of both cheque and bill were divisible between *Arthur* and his firm, in the proportion of eight-elevenths to *Arthur* and three-elevenths to his firm. Immediately after the receipt of these documents by *Schiender*, they were taken from him in *Norway*, by what we should call process of execution, under a judgment which had been previously obtained in *Norway* against *John Forster Alcock* for his private debt. On the 5th of May, 1890, they were sold under that execution by public sale to one *Schjödt*, who, it is said, knew all the facts. Afterwards they were sold again to *Köpmansbank* in *Norway*. He was ignorant of any defect of title or adverse claim; but he knew that the bill and cheque were overdue at the time they purchased them.

It is admitted that if the bill and cheque had been Norwegian instruments the title of *Köpmansbank* would be unimpeachable. An overdue bill may be transferred according to Norwegian law without being subject to any undisclosed equities. As to personal chattels, it is settled that the validity of a transfer depends, not upon the law of the domicil of the owner, but upon the law of the country in which the transfer takes place. Our own law as to distress and market overt is illustrative of this. The goods of a foreigner distrained in the house tenanted by an Englishman in this country may be sold for the tenant's rent, and the purchaser acquires a perfect title, whatever may be the law of the owner's domicil. So the goods of a foreigner sold here in market overt by one who had no title to them could not be recovered from the purchaser. In both cases the property would pass to him by our law.

It has not been denied in argument that this is so. The cases

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on the subject are clear and consistent. In *Cammell* v. *Sewell* (1) the master of a Prussian vessel sold the goods of an Englishman, which were on board his ship in *Norway*, under circumstances which gave the purchaser no title according to English law, but a good title according to the law of *Norway*, and it was held in the Exchequer Chamber that the law of *Norway* must govern the transaction, and that the property had passed to the purchaser. The authority of that decision was recognised in *Hooper* v. *Gumm* (2) and by the House of Lords in *Castrique* v. *Imrie* (3) and *Williams* v. *Colonial Bank* (4).

Therefore, so far as the bill and cheque are to be considered as chattels, undoubtedly the property in them is now vested in *Kopmansbank*, and no one could recover the documents from them.

But the Plaintiffs, admitting this, say, that this does not determine the right to the money due on the bill and cheque. They argue first, that the contract of the acceptor was to pay to the lawful holder according to the law of this country, and that *Kopmansbank* are not such lawful holders, or, secondly, that if they are, still by the law of this country, as at the time of the transfer to them, the bill and cheque were overdue, the latter having been in circulation an unreasonable time (sect. 36 of the *Bills of Exchange Act*, 1882); and that they took subject to the rights of the Plaintiffs, who had a superior equity.

I confess I can see no reason why *Kopmansbank* should not sue on this bill and cheque. The indorsement by *Meyer* was in blank. Thenceforward the bill and cheque became payable to bearer: *Bills of Exchange Act*, 1882, s. 34. *Kopmansbank* have lawfully, by the law of *Norway*, which is recognised by our Courts, the sole right to the possession of the documents. No one else can sue at law upon them in this country. The acceptor or drawee could not safely pay any one else. But the money has been paid by the acceptor and drawee and is now in Court, and the matter comes before us as an interpleader between the *Alcocks*, or rather *Arthur Alcock* on the one hand and *Kopmansbank* on the other, the question being which have the right at

(1) 3 H. & N. 617; 5 H. & N. 728; 29 L. J. (Ex.) 350.
(2) Law Rep. 2 Ch. 282.
(3) Ibid. 4 H. L. 414.
(4) 15 App. Cas. 267.

law or in equity to the money. Suppose the case had been a simple indorsement by a Norwegian holder of this bill and cheque when overdue. By the law of *Norway* such an indorsement would not subject the indorsee to the equities attaching on the bill. By the law of *England* it would. Which law would govern? Lord *Kingsdown*, in *Allen* v. *Kemble* (1) states the law thus: "When a bill is drawn, generally, the liabilities of the drawer, acceptor, and indorser respectively, must be governed by the laws of the countries in which the drawing, acceptance, and indorsement, respectively took place." In that case the bill was drawn by *Carberry*, in *Demerara*, upon *Mackie*, in *Scotland*, payable to *Allen*, in *London*. *Allen* indorsed it to a firm in *Demerara*, who indorsed it to *Troughten*, in *London*. The acceptor had a set-off against *Troughten*, and his assignees in bankruptcy accordingly sued in *Demerara*, *Carberry*, the drawer, and *Allen*, the indorser. It was held that their liability depended upon the law of *Demerara*, according to which the set-off of *Mackie* discharged *Carberry* from liability, and his defence protected *Allen* also. It is not necessary to give a decided opinion; but that *dictum* and the decision are certainly in favour of the view that the foreign law should govern.

None of the cases cited seem to have determined the exact point raised here. In *Trimbey* v. *Vignier* (2), a promissory note drawn in *France* by a person domiciled in that country in favour of a payee also domiciled there was indorsed in blank in *France*, which, by French law, did not effect a valid transfer. It was held that the French law must govern, and by that law there was no contract upon which the holder under that invalid transfer could sue. In *Lebel* v. *Tucker* (3), a bill of exchange was drawn, accepted, and payable in *England*. It was indorsed in *France* in a manner which was sufficient according to English law, but invalid according to the law of *France*. It was held that the indorsee could sue the acceptor in *England*. Both those cases merely related to the right to sue the promisor or acceptor. In neither was there any adverse claimant. It does not follow from them that if an English bill had been indorsed in a foreign

(1) 6 Moo. P. C. 314, 321. (2) 1 Bing. N.C. 151.
(3) Law Rep. 3 Q. B. 77.

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country according to the law of that country, but so that such indorsement was not good according to the law of *England*, and if the same indorser afterwards indorsed according to English law to another person such last-mentioned person would have the better title. In *Bradlaugh* v. *De Rin* (1), a bill was drawn in *Brussels* on an acceptor in *London*, and indorsed in *France*, and again the question was as to the right of the indorsee to sue, which it was there held depended upon whether the indorsement was valid by French law. The Court of Common Pleas held it was not, and that therefore the indorsee could not sue on the bill in this country. The Exchequer Chamber held the indorsement valid by the law of *France*, and that the plaintiff, therefore, could sue. In *Lee* v. *Abdy* (2), the assignment in the *Cape Colony* of an English policy of life assurance, which assignment was valid by English law but invalid by the law of the colony, was held to confer no title in *England*. In that case the representative of the deceased had an adverse claim; but although that was suggested, he does not seem to have been before the Court.

But there is a circumstance in this case which carries it beyond the case of a mere indorsement in *Norway* of an English bill. The bill when indorsed in blank, and therefore payable to bearer, has been seized and sold by a judicial proceeding in *Norway*, which undoubtedly by the law of *Norway* gave a perfect title both to the documents and to the money due on them, and free from any equities whatever. The Plaintiffs were represented in that proceeding by *Schiender* as their advocate, who resisted on their behalf; but they have not ventured to appeal, as I understand they might have done. Even if an indorsement in *Norway* of an English overdue bill would not be free from equities, such a sale as this in my opinion would; and on that ground I agree that this appeal fails, and must be dismissed with costs.

Solicitors: *Stokes, Saunders, & Stokes; Murray, Hutchins, & Stirling.*

(1) Law Rep. 3 C. P. 538; Ibid. 5 C. P. 473.

(2) 17 Q. B. D. 309.

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WESTERN WAGON AND PROPERTY COMPANY *v.* WEST.

CHITTY, J.

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Nov. 25, 26; *Dec.* 1.

[1888 W. 1665.]

Equitable Assignment—Contract to Advance Money—Notice—Breach of Contract —Damages—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6 [*Revised Ed. Statutes, vol. xvii. p.* 78].

P. mortgaged freehold property to the Defendants, to secure £7500 and further advances up to £10,000, which the Defendants contracted to make. *P.* made a second mortgage of the same property to the Plaintiffs, to secure £1000 and further advances up to £2500, and assigned to them his right, under the contract in the first mortgage, to call for and require payment from the Defendants of the further advances therein mentioned, and the full benefit of the contract. The Plaintiffs gave notice of this assignment to the Defendants, but notwithstanding the notice the Defendants subsequently made a further advance of £500 to *P.* The Plaintiffs brought an action to recover from the Defendants personally the sum of £500 so paid by them to *P.*, or damages for breach of contract:—

Held, that no money or fund was bound by the contract to make further advances, which created no debt, and that on this ground *Brice* v. *Bannister* (1) was distinguishable, and did not apply:

Held, also, that, whether the assignment did or did not fall within sect. 25, sub-sect. 6, of the *Judicature Act*, 1873, the Plaintiffs could not sue for damages in their own right, but only in the right of their assignor *P.*, who, on the facts, had sustained no damage, and that on this point also the Plaintiffs' claim failed.

ACTION by the *Western Wagon and Property Company, Limited*, to recover from the Defendants personally the sum of £500 alleged to have been improperly paid by them to one *Jonathan Dumbleton Pinfold*, under the following circumstances:—

By an indenture of mortgage of the 1st of September, 1886, after reciting that the Defendants had, at the request of the said *J. D. Pinfold*, agreed to make certain payments amounting in the aggregate to the sum of £7500, and (on the conditions thereinafter mentioned) to make to the said *J. D. Pinfold* further advances to the amount, on the whole (inclusive of the said sum of £7500) of £10,000, upon having the repayment of the same sums with interest secured as thereinafter appearing, the said

(1) 3 Q. B. D. 569.

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J. D. Pinfold covenanted with the Defendants, in the usual way, for the repayment of the said sum of £7500 and further advances and interest, and conveyed to the Defendants a brickyard and certain freehold property at *New Bilton*, in the county of *Warwick*, as security for the said sum of £7500 and further advances. The deed contained a covenant by the Defendants that, on certain conditions being complied with, they would not call in the money before a specified date; it also contained a proviso that no further advance would be made on this security except upon the production of a certificate of the Defendants' surveyor as to the execution of certain works on the property.

By an indenture of the 15th of August, 1887, made between the said *J. D. Pinfold* of the one part and the Plaintiffs of the other part, the said *J. D. Pinfold* mortgaged the hereditaments comprised in the said indenture of the 1st of September, 1886, to the Plaintiffs as security for the sum of £1000 then advanced, and further advances to the amount (inclusive of the said sum of £1000) of £2500, subject nevertheless to the Defendants' security; and by the same indenture he assigned to the Plaintiffs "all that the right of him, the said *J. D. Pinfold*, under or by virtue of the said agreement contained in the said indenture of mortgage of the 1st day of September, 1886, to call for and require payment from the Defendants thereunder of the further advance or advances therein mentioned, not exceeding altogether the sum of £2500, and the full benefit of such agreement," with power to the Plaintiffs "to ask, sue for, recover and receive, and sign and give effectual receipts for the said sum or sums of money in the name of the said *J. D. Pinfold*, his executors or administrators, and to do all things necessary or ancillary thereto."

On the 15th of August, 1887, the Plaintiffs duly gave notice to the Defendants of the said assignment by the said *J. D. Pinfold* to the Plaintiffs of his right to the further advances from the Defendants.

On the 22nd of November, 1887, the Defendants, in forgetfulness of this notice, made a further advance of £500 to *Pinfold*, for which a receipt was given and signed and endorsed on the mortgage of the 1st of September, 1886. No certificate had, however, been given by the Defendants' surveyor, and at the

hearing it was admitted that, as between the Defendants and *Pinfold*, the production of any certificate had been waived.

In May, 1888, the Plaintiffs commenced this action against the Defendants, claiming payment of the £500 thus improperly paid to *Pinfold*.

By their defence the Defendants disclaimed any right of priority over the Plaintiffs' security for the £500 paid to *Pinfold*.

Neither the Plaintiffs nor the Defendants sought any relief by way of redemption or foreclosure of their securities.

Byrne, Q.C., and *Maidlow*, for the Plaintiffs:—

The waiver of production of the surveyor's certificate by the Defendants operates for our benefit, and the case is reduced to one of equitable assignment with notice; consequently this £500 was bound at the moment it came into existence and was appropriated to make the advance agreed to be made by the original contract of the 1st of September, 1886: *Brice* v. *Bannister* (1). In *Ex parte Nichols* (2) *Brice* v. *Bannister* was expressly approved, though distinguished from the case then before the Court.

[CHITTY, J.:—You cannot obtain specific performance of a contract to make a loan: *Sichel* v. *Mosenthal* (3).]

That may be so, but even if we are not entitled to recover the specific sum of £500, we are entitled under the assignment to recover damages for breach of the agreement, and on a contract to make a loan, the measure of damages for breach is the amount agreed to be lent: *Larios* v. *Bonany y Gurety* (4).

Levett, Q.C., and *Onslow*, for the Defendants:—

The Plaintiffs can only sue in right of *Pinfold*, and it is plain that he has suffered no damage. The Plaintiffs' argument amounts to this, that because we have made a payment which we could not have been compelled to make, therefore they have a right to compel us to make the payment over again. Neither *Brice* v. *Bannister* nor *Larios* v. *Bonany y Gurety* are

(1) 3 Q. B. D. 569.
(2) 22 Ch. D. 782.
(3) 30 Beav. 371.
(4) Law Rep. 5 P. C. 346.

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authorities for the propositions for which they are cited. Then, again, it is questionable whether the assignment of the 15th of August, 1887, is within sect. 25, sub-sect. 6, of the *Judicature Act* 1873.

Byrne, in reply:—

The amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken: *Alder* v. *Keighley* (1); *Loosemore* v. *Radford* (2); *Carr* v. *Roberts* (3); *Chitty* on Contracts (4). That the Plaintiffs are entitled to general and substantial damages for breach of this contract to advance, seems plain from the remarks of the Judges in *Larios* v. *Bonany y Gurety* (5).

[CHITTY, J:—I cannot find in the judgment anything to the effect that the measure of damages in a case like this is the amount agreed to be advanced.]

We submit that this proposition can be collected from the judgment.

The assignment of the benefit of this contract to make further advances, is an absolute assignment within sect. 25, sub-sect. 6, of the *Judicature Act*, 1873: *Tancred* v. *Delagoa Bay and East Africa Railway Company* (6); *Walker* v. *Bradford Old Bank* (7).

Levett, in reply, to fresh cases cited.

1891. Dec. 1. CHITTY, J. (after stating the facts, continued):—

Now, upon these facts, the case stands thus: the Plaintiffs are the assignees for value of the benefit of a contract to make a loan of money at interest upon security. Having given notice of their assignment, they claim to recover from the Defendants the £500 which the Defendants lent and paid to *Pinfold* under the contract. They are not assigns of the entire contract, but they

(1) 15 M. & W. 117.
(2) 9 M. & W. 657.
(3) 5 B. & Ad. 78.
(4) 12th Ed. p. 849.
(5) Law Rep. 5 P. C. 346.
(6) 23 Q. B. D. 239.
(7) 12 Q. B. D. 511.

are assigns of the benefit without the burden; they claim to be entitled to receive and keep the £500, without being liable to repay. However, I pass this point by as not being material to my judgment, which is founded on the following reasons:—A Court of Equity will not decree specific performance of a contract to make or take a loan of money, whether the loan is to be on security or not. This was decided by Sir *John Romilly* in *Rogers* v. *Challis* (1), and *Sichel* v. *Mosenthal* (2), and these decisions were approved of by the Privy Council in *Larios* v. *Bonany y Gurety* (3). In other words, a Court of Equity will not compel the intended lender to make, or the intended borrower to take, the loan, but will leave the parties to such a contract to their remedies by action at Common Law for damages. It follows, then, that *Pinfold* could not have maintained a suit in Equity against the Defendants to compel them to lend the £500, and that, inasmuch as the Plaintiffs, as assigns of *Pinfold*, are in no better position than *Pinfold* himself, the Plaintiffs cannot maintain such a suit.

But I must not be supposed to be resting the doctrine of equitable assignment on the basis of the doctrines applicable to specific performance. The decision of Lord *Cottenham* in *Metcalfe* v. *Archbishop of York* (4) is an authority for the proposition, that property may be bound by a contract for valuable consideration, although specific performance of the contract itself is impossible. This subject is dealt with very fully by Lord *Macnaghten* when advising the House of Lords in *Tailby* v. *Official Receiver* (5). Still the proposition remains intact that the Plaintiffs could not at any time before payment to *Pinfold* have obtained a decree in Equity against the Defendants, compelling them to pay the money specifically to the Plaintiffs.

But to pursue the matter further, the contract by the Defendants to lend money was not a contract to lend out of a particular fund, but merely a contract to lend generally. No money or fund, therefore, was bound by the original contract. It was, however, argued for the Plaintiffs, that the £500 was bound by

(1) 27 Beav. 175.
(2) 30 Beav. 371.
(3) Law Rep. 5 P. C. 346.
(4) 1 My. & Cr. 547.
(5) 13 App. Cas. 523.

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the equitable assignment to the Plaintiffs operating by way of contract on the money at the moment it came into existence and was appropriated to the advance agreed to be made under the original contract. This reasoning appears to me to be over-refined and not applicable. Of course the £500 was bound directly it came to the hands of *Pinfold*. And it may be conceded to the Plaintiffs, and the concession would, I think, be well founded, that if the Defendants had remitted the money by a bank bill or in some other like manner, the Plaintiffs could have intervened while the money was in transit, and by means of an injunction or receiver have obtained ultimately payment to themselves of the money before it reached the hands of *Pinfold*. But I think the money was never bound in the hands of the Defendants. It was the Defendants' own money in their hands until they actually parted with it. If the Defendants had written to *Pinfold* to say, "We have placed £500 on our joint account at our bankers ready to advance to you," and had actually so placed £500 of their own money, such voluntary appropriation would not have given either *Pinfold*, or the Plaintiffs as his assigns, any right to that specific sum: the Defendants might still have dealt with the £500 as their own money at their own will and pleasure. The Defendants have, in fact, parted with their own money without obtaining the security they intended, which security they have given up by their disclaimer, and they have, regard being had to *Pinfold's* insolvency, practically lost their money.

The argument for the Plaintiffs, when analyzed, appears to me to rest on the payment to *Pinfold*, and to be reducible to the absurd proposition that because the Defendants have made a payment which they could not have been compelled to make, therefore they ought to be compelled to make the payment over again.

The decision of the Court of Appeal in *Brice* v. *Bannister* (1), strongly relied on for the Plaintiffs, has, I think, no bearing on the question before me. That was a case of an assignment of part of moneys due or to become due. In substance it was an assignment of part of that which, when ascertained, became a

(1) 3 Q. B. D. 569.

debt. It was held that the assignment bound the debt in Equity, and that after notice of the assignment the debtor could not by anticipating the time for payment, or other dealing with the assignor, defeat the claim of the equitable assignee. In the case before me the contract to make the loan created no debt, nor did any future debt arise out of it.

It was further argued for the Plaintiffs, that if they are not entitled to recover the specific sum of £500, they are, at all events, by virtue of the assignment to them of *Pinfold's* right to sue, entitled to recover damages for breach of the contract to make the loan. There are several answers to this argument. First, their action is not framed for any such purpose; there is no suggestion of any damage to *Pinfold*. But, secondly, assuming that under the claim for further relief they could, notwithstanding the frame of their action, ask for damages, they have not shewn that in fact *Pinfold* has sustained any damage. Whether the assignment does or does not fall within the 25th section, sub-sect. 6, of the *Judicature Act*, 1873, the Plaintiffs cannot sue for damages in their own right; they can sue only in the right of *Pinfold*; it is plain that *Pinfold* has sustained no damage. It was contended for the Plaintiffs that on a contract to make a loan the measure of damages for breach was the sum agreed to be lent, and that the damages were thus liquidated and ascertained. Reliance was placed on the decision of the Privy Council in *Larios* v. *Bonany y Gurety* (1). The case is very complicated; it is sufficient to say it decided nothing of the kind. On a contract to make a loan of money, the measure of damages is the loss sustained by the breach, and the damages may be merely nominal. For instance, if *A.* agrees to lend *B.* £100 at interest for a week, and makes default, and *B.* within a few minutes after the time at which the £100 ought to have been lent, obtains from his bankers a loan of £100 at the same rate of interest and for the same period of time, the damages would be merely nominal. Damages recovered are not recovered by way of loan; the Plaintiff puts them into his pocket and keeps them. It is really difficult to understand how this argument as to the measure of damages could have been seriously advanced.

(1) Law Rep. 5 P. C. 346.

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Throughout this judgment I have assumed in favour of the Plaintiffs that the waiver of the condition as to the certificate operated for the Plaintiffs' benefit.

The action is dismissed with costs.

Solicitors: *Robbins, Billing & Co.*, agents for *Abbot, Pope, Brown, & Abbot, Bristol; Frere Forster & Co.*

W. C. D.

NORTH, J.
1891
Dec. 10.

In re BIRD.
PITMAN *v.* PITMAN.

[1891 B. 3493.]

Will—Conversion—Trust to invest in Freehold, Copyhold, or Leasehold.

A testator devised real estate on trust to raise money by sale or mortgage and subject thereto pay the rents and profits of the premises to *A.* and *B.* successively for life, and on the death of the survivor for children of *B.* absolutely. The will contained a power to sell the premises with a trust for reinvestment in land of freehold, copyhold, or leasehold tenure, with consent of tenant for life, with an interim power of investment in personal estate. The trustee sold the premises and invested in Consols. The trust for reinvestment in land was never executed:—

Held, that the share of a child of *B.*, who died after the exercise of the power of sale and during the life of a tenant for life intestate, devolved on his heir.

THE testator in this matter, *James Bird*, died in March, 1850, having by his will, dated 1844, devised real estate at *Cricklewood* to *Henry Peale Bird* and his son-in-law *Thomas Pitman* (the elder) upon trust. The testator devised other real estate, and bequeathed some leaseholds to the same trustees. The trusts declared by the will (as modified by codicils) of the real estate at *Cricklewood* were to raise a sum of £1500 and costs to be applied in manner directed, and subject thereto to pay the rents and profits of the same premises to his wife during her life, and after her death to raise two other sums of £666 and £633 by sale or mortgage of the *Cricklewood* real estate, and, subject to the prior trusts, to pay the rents and profits of the premises to *Thomas Pitman* the elder for life, "and after the decease of the survivor of my said wife and the said *Thomas Pitman*, and subject as aforesaid do, and shall be seised of the said last-mentioned hereditaments and premises and the rents and profits thereof, in trust for all the children living at my decease, and who shall attain the age of twenty-one years or (being a daughter or daughters) marry, of my said deceased daughter *Frances Jane*, by the said *Thomas Pitman*, and the issue living at my decease, and who shall attain the age of twenty-one years or (being a

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daughter or daughters) marry, of any such child or children who may have died in my lifetime leaving issue, to be divided between or among them in equal shares as tenants in common and their heirs and assigns for ever, such issue however taking, and, if more than one, in equal shares, as tenants in common, such share or shares only as his or their parent or respective parents would have taken if living at my decease, and attaining the age of twenty-one years or (being a daughter or daughters) marrying, and in case there shall be no child or issue of my said daughter *Frances Jane Pitman* by the said *Thomas Pitman* who shall attain a vested interest in the said premises under the trusts aforesaid, then in trust for the said *Thomas Pitman*, his heirs and assigns for ever." Other real estates and leaseholds were devised and bequeathed by the testator to the same trustees on several trusts. It was declared by the will that "it shall be lawful for the trustees or trustee for the time being of the freehold and leasehold hereditaments hereinbefore respectively devised and bequeathed as aforesaid at any time or times during the life of my said wife, upon her request in writing, and after the decease of my said wife upon the request in writing of any person or persons of full age who may for the time being be entitled by virtue of this my will to the receipt of the rents and profits of the property in respect of which this power is for the time being proposed to be exercised, and if there shall be no such person in existence, then at the discretion of the trustees or trustee for the time being absolutely to sell and dispose of the said hereditaments and premises hereinbefore devised and bequeathed respectively," or any part in manner therein directed. And the testator declared "that when all or any part of the said hereditaments and premises shall have been sold under the exercise of the aforesaid power of sale, the said trustees shall, as opportunity shall occur, and they or he shall see proper, lay out the money to arise from such sale in the purchase of other messuages, lands, or hereditaments, to be situated in *England* or *Wales*, of a clear and indefeasible estate of inheritance in fee simple in possession or of lands of a leasehold or copyhold tenure, and to make any such purchase subject to any special conditions under which the premises so to be purchased may be offered for

sale without incurring any responsibility in respect thereof, yet so that every such purchase be made with the consent in writing of my said wife during her life, and afterwards of the person or persons who for the time being shall be entitled under the trusts hereinbefore contained to the receipt of the rents and profits of the hereditaments to be so purchased if such person or persons shall be of full age, and, if not, at the discretion of the trustees or trustee for the time being." And the testator declared that until the money arising by such sale or sales as aforesaid should be disposed of in manner thereinbefore mentioned, it should be lawful for the trustees or trustee of his said will, with such consent or at such discretion as aforesaid, "to place out such sum or sums of money at interest either in the parliamentary stocks or public funds, or upon government or real securities in *England* or *Wales*, or upon leasehold securities in *England*."

The testator's wife survived him and died in September, 1851. In accordance with the directions contained in the will, the *Cricklewood* estate was mortgaged in fee for the sum of £2969. In March, 1858, the sole trustee of the will under the power of sale above set out, sold the *Cricklewood* estate, and realized, after paying the mortgage debt and costs of sale, the sum of £2689 4*s.* 2*d.* which was invested in Consols. *Thomas Pitman* (the elder) died in May, 1890. Consequently the proceeds of the sale of the *Cricklewood* estate became distributable. There were six children of *Thomas Pitman* (the elder) by his wife, *Frances Jane*, the testator's daughter, living at the death of the testator who attained twenty-one. One of such six children, *Thomas Pitman* (the younger), died intestate in December, 1863, leaving a widow, *Mary Pitman*, who was his administratrix and a Defendant to this summons, a son, *Thomas Pitman*, his heir-at-law, who was the only other Defendant, and two daughters.

This was the hearing of an originating summons taken out by the present trustees of the fund, now represented by cash on deposit, to determine whether the share of *Thomas Pitman*, the younger son, belonged to his heir or to his personal representative.

Manby, for the trustees.

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J. G. Wood, for the heir of *Thomas Pitman* (the younger):—

The property was originally real estate; the limitations in the will were applicable to real estate. It is clear the testator intended it to be taken as real estate: *Walker* v. *Denne* (1). The fact that a power of sale was exercised (there then being a trust for reinvestment in land) does not affect the question, notwithstanding the authorized interim investment; the only question is whether the fact that the trustees could have reinvested in leaseholds affects the matter. Even where property originally personal estate was directed to be laid out in real or leasehold estate with limitations applicable to realty, it was held that the testator intended it to be realty: *Hereford* v. *Ravenhill* (2). There was a power to invest in leaseholds in lieu of real estate, but till that power was exercised the property remained realty.

G. B. Freeman, for the widow:—

A trust to sell and invest in land or Government securities, though the limitations were those applicable to real estate, was held to make property invested in Government securities personal estate: *Rich* v. *Whitfield* (3); that decision seems applicable to the present. There is no equity between the real and personal representatives to have the property considered other than it actually is: *Walker* v. *Denne*. Here the property was, at the time *Thomas Pitman* (the younger) died, actually personal estate, and personal estate it might, even after reinvestment, properly remain.

J. G Wood, in reply:—

In *Rich* v. *Whitfield*, there was a trust to sell; here there is only a power.

NORTH, J.:—

It is quite clear that there was a mere power to sell the land, and it was entirely optional with and not imperative upon the trustees to sell, and the distinction between a power and trust for

(1) 2 Ves. 170, 182. (2) 5 Beav. 51.
(3) Law Rep. 2 Eq. 583.

sale is important. There was a power of interim investment, and also a trust for investment in land of freehold, copyhold, or leasehold tenure, with the consent of the tenant for life; no such consent was given, and for some reason not explained, the property was allowed to remain in the interim investment till the time when the life estate of *Thomas Pitman* the elder came to an end. Nothing has happened, or could have happened, since the death of *Thomas Pitman* the younger to change the nature of the property. What was the interest that he had at that time? In my opinion it was in the nature of an interest in real estate, and remains so still. The property was real estate in the first instance: all the limitations in the will respecting it were applicable to real estate and real estate only; there was a power of sale, but the exercise of that power did not of itself amount to a conversion; the proceeds might be invested in real estate or optionally in leasehold estate. There being no trust for sale, but only a power, although the sale itself did not effect a conversion, no doubt if the trustees with proper consent had exercised the option of investing in leasehold estate, there might have been a conversion to personalty; but they never did exercise that option, and the property remained real estate for the purposes of devolution. It never was in the power of *Thomas Pitman* the son to make a conversion, for when he died there was a tenant for life living and five other persons were interested equally with him in remainder; and therefore, as he died intestate, the interest to which he was entitled devolved upon his heir-at-law, and does not belong to his next of kin.

Solicitors for the trustees and heir: *Faithfull & Owen.*
Solicitors for the widow: *Boulton, Sons, & Sandeman.*

D. P.

STIRLING, J.

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Aug. 1, 8.

DAW v. HERRING.

[1891 D. 543.]

Partnership—Partnership Articles—Expiration or Determination of Partnership by Effluxion of Time—Continuance of Business without Fresh Arrangement—Application of Provisions in Articles to Partnership at Will.

A. and *B.* carried on business under articles of partnership which contained a clause providing that "within three *months after the expiration* or determination *of the partnership by effluxion of time*" *B.* should have the option, to be signified within three *months after the determination of* the partnership, of purchasing *A.*'s share in the business.

After the expiration of the term created by the articles of partnership, *A.* and *B.* continued to carry on the business without making any fresh arrangement:—

Held, that the provisions of the clause in the original articles giving *B.* the option of purchasing *A.*'s share remained in force, and were applicable to the partnership at will carried on by them after the expiration of the original term.

Neilson v. *Mossend Iron Company* (1), *Cox* v. *Willoughby* (2), and *Yates* v. *Finn* (3), discussed.

ADJOURNED SUMMONS.

Prior to November, 1882, the Defendant's father, *E. F. Herring*, had for some time carried on the business of an auctioneer, surveyor, and land agent at *Moorgate Street* and *Brixton*. In that month the Plaintiff, *W. H. Daw*, agreed to purchase from *E. F. Herring* a share of the business and to become a partner therein.

By articles of partnership between *E. F. Herring* and the Plaintiff, dated November, 27, 1882, it was provided, (clause 1) that the partnership should commence as from September 29th, 1882, and should continue for the term of five years, if both partners should so long live, subject, in the case of the death of *E. F. Herring* during the partnership, to clause 31; (clause 26) that *E. F. Herring* should be entitled to two-thirds and the Plaintiff to one-third of the net profits of the business; (clause 27) that, within three months "after the expiration or determination

(1) 11 App. Cas. 298. (2) 13 Ch. D. 863.
(3) 13 Ch. D. 839.

of the partnership by effluxion of time," a general account should be taken by the partners of the assets and liabilities of the partnership, and a valuation should be made of the particulars in such account capable of valuation, including the goodwill of the business and leases, and that, after providing for the liabilities, the assets should be divided between the partners in proportion to their respective shares in the business; and if the partners were unable to agree to such division, or any dispute should arise with respect thereto, then *E. F. Herring* should have the option, to be signified within three months after the determination of the partnership, of purchasing the Plaintiff's share in the business at a valuation, and that in default of the exercise of such option, the goodwill, leases, and other assets of the business should be sold, and the sale moneys should be divided between the partners in manner therein mentioned; (clause 28) that if either partner should die during the partnership the like account and division should, subject to clause 31, be taken and made between the surviving partner and the executors of the deceased partner as had been directed to be taken and made between the partners on the determination of the partnership by effluxion of time; provided that the surviving partner should be at liberty to take the share of the deceased partner at a valuation upon giving to the executors of the deceased partner three months' notice in writing of his intention in that behalf at any time within three months of the death of such partner; (clause 29) that either partner should in certain cases have the power of determining the partnership and expelling his co-partner; and (clause 31) that in case *E. F Herring* should die during the continuance of the partnership the Defendant should, upon giving notice within a certain time, succeed to his father's share in the business, and become a partner therein in the same manner as if his name had been originally inserted in the articles instead of his father's name.

The shares of the partners were afterwards altered, and each became entitled to one-half of the profits. *E. F. Herring* died in 1886, and the Defendant was duly admitted a partner in his place, under clause 31 of the articles. The partnership term of five years expired on September 29, 1887; but the Plaintiff

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and the Defendant continued to carry on the business without any fresh arrangement being made between them until March 13, 1891, when the Defendant gave the Plaintiff notice to determine the partnership. Thereupon the Plaintiff gave the Defendant a similar notice, and on the 23rd of March he brought an action to wind up the partnership, by the judgment in which the usual order for an account of the partnership dealings was made, and a receiver was appointed.

The Defendant then took out the present summons, in which he asked for a declaration that he was entitled to purchase the Plaintiff's share and interest in the business and the goodwill and effects of the partnership lately subsisting between them, on the terms and under the provisions of clauses 27 and 31 of the articles of partnership of November 27, 1882.

Buckley, Q.C., and *G. P. Lawrence*, for the Defendant, in support of the summons:—

All the provisions of the articles of partnership containing the terms of the original contract remain in force, and apply to the partnership at will carried on between the Plaintiff and Defendant after the expiration of the partnership term except such of them as are in their nature inconsistent with some implied term of the new contract: *Cox* v. *Willoughby* (1); *Yates* v. *Finn* (2); *Lindley* on Partnership (3); *Neilson* v. *Mossend Iron Company* (4); *Essex* v. *Essex* (5). There is nothing in clause 27 which is so special that it cannot reasonably be applied to a partnership at will; article 29 gives the power of determining the partnership by the expulsion of a co-partner, and clause 27 covers every other event upon which the partnership can come to an end. A partnership at will is a partnership which subsists so long as the partners are willing that it should continue. It determines by the volition of the partners. The expression "effluxion of time" includes cessation by any means whatever (other than expulsion of a partner) of the period for which the partnership has subsisted, and in the case of a partnership at will

(1) 13 Ch. D. 863, 870.
(2) Ibid. 839.
(3) 5th Ed. p. 410.
(4) 11 App. Cas. 298, 311.
(5) 20 Beav. 442.

the determination of the partnership by effluxion of time means the arrival of the moment at which the partners choose that the period of their partnership shall cease. Clause 27 accordingly applies, and the Defendant is entitled to the option of purchasing the Plaintiff's share in the business according to the provisions of that clause.

Hastings, Q.C., and *S. Dickinson*, for the Plaintiff:—

The observations of Lord *Watson* in *Neilson* v. *Mossend Iron Company* (1) shew that clauses such as clause 27 are inapplicable to partnerships at will. He says with reference to a clause giving the partners certain powers of retiring "if three months before the termination of the contract" they should not all have agreed to continue the business: "The conditions, rights, and obligations arising out of it are totally inapplicable to a contract at will. They have plain reference to a fixed *punctum temporis*, the termination of the original contract; but how are they to be applied to a contract which has no definite currency?" So in this case there is no *punctum temporis* at all after the original term has expired to which the words "effluxion of time" can apply. It is said that a partnership at will is a partnership for a time during which the partners shall agree that it shall continue; but it is in reality a partnership at pleasure, and not for any fixed time or period whatever. Cases like *Essex* v. *Essex* (2) accordingly do not apply. Again, if a clause like this could be applied to a partnership at will, it would enable a partner to obtain an undue advantage by watching his opportunity, and giving notice when the state of the partnership assets made the option a beneficial one.

Buckley, in reply.

1891. August 8. STIRLING, J. (after stating the facts of the case, continued):—

The question which I have to decide is whether the provisions of clause 27 apply at the determination of the partnership at will which has been carried on since the expiration of the term

(1) 11 App. Cas. 298, 311. (2) 20 Beav. 442.

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created by the articles of partnership. The authorities are not perhaps entirely consistent; but the subject has been recently considered in the House of Lords on appeal from the Court of Session in Scotland in *Neilson* v. *Mossend Iron Company* (1).

[His Lordship then read a portion of the judgment of Lord *Selborne*, and the greater part of the judgment of Lord *Watson* in that case, and then continued:—]

It appears to me that the judgment of Lord *Watson* is founded on two propositions. The first is a general one, and may be stated precisely in his own words: "All the stipulations and conditions of the original contract remain in force in so far as these are not inconsistent with any implied term of the new contract." The second special one is this: the provisions made by the original contract for the winding-up of the partnership affairs on the termination of the original partnership remain in force, unless the special character of the stipulations is such that they cannot reasonably be applied to a contract determinable at will. The question is not, as I read Lord *Watson's* observations on the passage quoted from the judgment of Lord *Shand*, whether the language of the original contract with reference to the termination of the partnership originally constituted is strictly appropriate to the termination of a partnership at will, but whether the provisions as to the consequences of the termination of the original partnership are in their essence applicable or inapplicable to a partnership at will. Further, I may point out that if the question were merely one as to the verbal construction of the original contract, the elaborate reasoning by which Lord *Selborne* and Lord *Watson* establish the inapplicability of the particular clause to a partnership at will would be altogether unnecessary.

The view adopted by the House of Lords appears to me to agree with that expressed by Lord Justice *Fry* in *Cox* v. *Willoughby* (2), where he says: "The exception, I think, does not apply only to the covenant for duration, but to every stipulation in the original deed which is inconsistent with the new partnership at will. Obviously there may be many provisions not consistent with such a partnership, and all those, and those

(1) 11 App. Cas. 298, 311. (2) 13 Ch. D. 871.

only, which are consistent will apply. Is this 19th clause consistent or inconsistent with a partnership at will? In my judgment it is quite consistent, and I therefore hold that the partners continue bound by it." The clause there referred to provided in terms for the decease of one of the partners before the expiration of the partnership term of fifteen years, and yet it was held that it applied to a partnership at will continued after the expiration of that term.

It was said, however, that an opposite conclusion had been arrived at in a case of *Yates* v. *Finn*, which is referred to in 13 Ch. D. at p. 840. That is the report of the decision on the further consideration of the case; but the material question in that case was decided at the hearing on the 1st of May, 1875. There is a short statement in the report (1) that upon the hearing of the cause on the 1st of May, 1875, the Vice-Chancellor held that the partnership was, after the 16th of August, 1857, a partnership at will, and that the provision for purchase was not operative or applicable after the expiration of the ten years' term; and his Lordship made the ordinary partnership decree directing the usual accounts and inquiries, with liberty to apply as to a sale of the business and goodwill as a going concern; and the decree was affirmed on appeal by the Lords Justices. Of course, being a judgment of the Court of Appeal, if there was anything inconsistent with what was laid down by Lord Justice *Fry* in *Cox* v. *Willoughby* (2), I would be bound to follow the older case. But through the exertions and assistance of the Registrar, Mr. *Clowes*, and the learned reporter, Mr. *Knox*, I have been able to have from the files of the Court the bill in *Yates* v. *Finn*, which states in full the terms of the partnership deed, and I have also by the courtesy of the solicitors in the case been furnished with a copy of Vice-Chancellor *Hall's* judgment taken from the short-hand notes.

Unfortunately, there has been no transcript taken of the short-hand notes of the judgments delivered in the Court of Appeal; but I have read carefully the judgment of Vice-Chancellor *Hall*, and also the partnership deed, and it turns out that in that case there were special stipulations in the partnership

(1) 13 Ch. D. 840. (2) 13 Ch. D. 871.

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deed, and it is with the special nature of those that the Vice-Chancellor deals in his judgment. He does not proceed merely upon the verbal wording of the partnership clause, but the conclusion of his judgment is, "without express stipulations providing for such a case as that, it would be impossible in my judgment to import these clauses into the new optional partnership contract between the parties." I may mention that in particular there was a provision not merely for the winding up of the partnership by a payment of a sum to a particular partner upon the footing of a balance-sheet, but there was also a stipulation that for the rest of the partnership term an annuity should be paid to him or his representatives; and that was one of the circumstances upon which the Vice-Chancellor strongly relied. It seems quite impossible to apply a stipulation like that as to the payment of an annuity, to a partnership at will in which there is no fixed term at all. It seems to me, therefore, that I am not bound by the decision in *Yates* v. *Finn* (1) to come to any conclusion which is adverse to that of Lord Justice *Fry* in *Cox* v. *Willoughby* (2).

Then, returning to the original contract in the present case, we find that the consequences following from the determination of the original partnership are provided for in three clauses, namely, clauses 27, 28, 29. Clause 29 confers a power of expulsion, and it has been expressly decided in the Court of Appeal in *Clark* v. *Leach* (3) that such a power is inapplicable to a partnership of will. No question arises upon that clause in the present case, and therefore I may leave it out of consideration. Clauses 27 and 28 seem to me to provide for what is to take place on the natural termination of the original contract. The stipulation as to the continuation of the partnership is this: the partnership shall continue for the term of five years if both partners shall so long live. It may, therefore, be terminated in two events, either when both partners are alive, or when one of them is dead. Clause 27 appears to me to be directed to the former event, clause 28 to the latter. The language of neither is strictly appropriate to the termination of a subsequent partnership at will; but, if I am

(1) 13 Ch. D. 839. (2) 13 Ch. D. 863.
(3) 1 D. J. & S. 409.

correct in the view of the law which I have deduced from the decision in the House of Lords and the speech of Lord *Watson*, what I have to consider is whether the provisions of these clauses are in their essence inapplicable to a partnership at will. I think not. The only peculiarity of clause 27 is that it gives to Mr. *Herring* the option to purchase the business on certain terms. The reason of that appears to be that he was the original owner of the business. I see no reason why that should be inapplicable to a partnership at will. It was said that it might induce the partner to whom it was given to dissolve at a moment when he would gain an undue advantage, regard being had to the then state of the partnership assets. The answer appears to be found in the words of Lord *Watson* (1): "The right must, of course, be exercised in *bonâ fide*, and not for the purpose of deriving an undue advantage from the state of the firm's engagements"; but his Lordship adds, "no question of that kind arises here." The same remark appears to me to be applicable in this case. I think, therefore, that Mr. *Herring* is entitled to the option which he claims.

An appeal by the Plaintiff was withdrawn by consent.

Solicitors: *Arber & Lewis; Loughborough & Gedge.*

(1) 11 App. Cas. 309.

W. W. K.

KEKEWICH, J.

1891 Oct. 29.

In re G—— (AN INFANT).

Infant—Guardian—Appointment of Guardian by Mother—Father, rights of, as Guardian—Father's Misconduct—Removal of Father—Statutory Power, Exercise of—Intention—Jurisdiction—Guardianship of Infants Act, 1886 (49 & 50 *Vict. c.* 27), *s.* 3, *sub-s.* 2, *s.* 13.

The provisional appointment or nomination by a mother, during the father's lifetime, under sect. 3, sub-sect. 2, of the *Guardianship of Infants Act*, 1886, of guardians of her infant child after her death, should be, in form, an appointment of guardians to act "jointly with the father"; and upon an application, under that sub-section, after her death, to confirm the appointment made by her, the Court can make an order under the Act in that form only, provided it is satisfied by the evidence that the father is "unfitted to be the sole guardian"; though, under its general jurisdiction, which is preserved by the concluding words of the sub-section, and also by sect. 13, the Court may, in a proper case, altogether displace the father.

A mother, separated from her husband, by her will, dated in 1890, appointed, "so far as she might be able," two guardians of her infant daughter, those guardians not being expressed to be appointed "jointly with the father" pursuant to the statutory power given to a mother by sect. 3, sub-sect. 2, of the *Guardianship of Infants Act*, 1886. Upon the death of the mother, the infant, being then eleven years of age, applied, under that sub-section, by one of the testamentary guardians as next friend, to have the appointment confirmed by the Court, and the father therefore displaced, misconduct being alleged against him:—

Held, that the testamentary appointment, though wrong in form, must be treated as having been intended to be made under the statutory power; and accordingly an order was made confirming the appointment jointly with the father, the Court being satisfied, upon the evidence, that the father was "unfitted to be the sole guardian."

THIS was an application, under the *Guardianship of Infants Act*, 1886, by an infant, a girl eleven years of age, by her next friend, asking for the confirmation of an appointment of guardians made by her mother. The father and mother of the infant were married in 1876, the father being a marine engineer, and the infant was the only surviving child of the marriage.

In 1889 the mother filed a petition for dissolution of her marriage on account of her husband's adultery and cruelty. The husband did not appear at the hearing of the petition, and

a decree *nisi* was pronounced on the 19th of June, 1890, the custody of the child being given to the mother.

On the 3rd of June, 1890—that is, prior to that decree—the mother made a will by which she appointed two persons "to be the executors and trustees of this my will, and, so far as I may be able (being at the present time separated from my husband and suing for a divorce), I appoint my said executors and trustees, or the survivor of them, to be the guardians or guardian of my infant child"—being the infant above referred to. And after bequeathing various legacies, she gave the residue of her property to her trustees upon trusts for the benefit of the infant.

On the 10th of July, 1890, the mother died, whereupon the two guardians named in the will took charge of the infant and placed her with the married sister of one of them. The father then requested them to give up the child to him, and on their refusal to do so, applied to the Queen's Bench Division for, and obtained, a writ of *habeas corpus*. In the meantime, and before that writ was returnable, the present originating summons, intituled in the matter of the infant, and in the matter of the *Guardianship of Infants Act*, 1886, was taken out by one of the testamentary guardians, as next friend of the infant, asking that the nomination of the two guardians by the will of the mother might be confirmed by the Court, and that they might be authorized and empowered to act as such guardians of the person of the infant, and to have custody of the said infant and the care of her maintenance and education during her minority, or until further order, and for the application of the income of the funds bequeathed to her by the will for her maintenance and education.

Upon the proceedings under the writ of *habeas corpus* coming before a Judge of the Queen's Bench Division, they were ordered to stand over until the present summons had been disposed of.

The summons now came on for hearing. In support of the summons the testamentary guardians made a joint affidavit to the effect that the father was a person of violent and habitually drunken habits, and of immoral and dissolute habits, and totally unfit to have the control and custody of a female child of tender

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years; and further evidence was adduced to the same effect. It appeared that the father was still living with the woman with whom he had been charged in the divorce action as having committed adultery. In an affidavit in opposition to the summons, the father admitted the adultery charged in the divorce action, but denied the cruelty. He also admitted occasional intoxication, but denied habitual drunkenness. He desired that the care of the child should be entrusted to one or other of certain persons named by him in his affidavit.

The summons was heard *in camerâ.*

Warmington, Q.C., and *Micklem*, for the summons:—

We ask that the appointment of guardians made by the mother may be confirmed. No doubt, under sect. 3, sub-sect. 2, of the *Guardianship of Infants Act*, 1886, the mother can only nominate guardians to act "jointly with the father"; but our case is not that the father is unfit merely to be "sole guardian," but that he is unfit to be a guardian at all, and that he should be displaced altogether by an order of the Court acting under its ordinary jurisdiction over infants. Now the evidence shews that the father has been guilty of such gross and continued immorality, intemperance, and violence, that he has forfeited his paternal rights, and, upon the principles upon which the Court acts in such cases, ought not to be entrusted with the guardianship or custody of his child at all: *Wellesley* v. *Duke of Beaufort* (1); *In re Goldsworthy* (2); *In re Agar-Ellis* (3). The question the Court has to consider is, what is for the interest of the child? It is impossible to say that in this case it is for the interest of the child that the father should have any control over her.

Marten, Q.C., and *Colam*, for the father:—

The summons is misconceived, and is wrong in form, having regard to sect. 3, sub-sect. 2, of the *Guardianship of Infants Act*, 1886, under which this application is made. The sub-section is really not applicable at all, because the appointment which the Court may confirm must have been "provisional" only. Here it is

(1) 2 Russ. 1, 30. (2) 2 Q. B. D. 75, 83-4.
(3) 24 Ch. D. 317, 328.

not provisional. The mother has appointed guardians altogether independently of the father, but under the sub-section the Court can only confirm an appointment that has been made of guardians jointly with the father, and then only if he is unfitted to be sole guardian. The section contemplates joint action. A power to appoint *A.* as guardian jointly with *B.* is not exercised by an appointment of *A.* alone. What is now asked is that the father may be displaced; but the father's rights as guardian cannot be interfered with unless he is shewn to be unfitted to be a guardian at all. The Act does not interfere with the father's control over the education of his child: *In re Scanlan* (1).

[KEKEWICH, J.:—That case relates to religious education only. I do not think it affects this case. I might make an order recognising the father as joint guardian, and at the same time control the education of the infant, so as practically to take care that he should not interfere with her education as against the mother's nominees. I have not yet had any case before me of an appointment of a guardian by a mother leaving the father surviving, though I have had cases relating to displacing the mother as guardian. I have always been reluctant to displace the mother, and what I have done in such cases is to appoint guardians jointly with the mother—usually two besides the mother—so that on questions of maintenance and education the views of the majority may prevail. Supposing I find that in this case the father is unfitted to be guardian, can I remove him, or may I appoint assessors?]

If the Court is satisfied that the father is a person unfitted to be entrusted with the custody of his child, the Court has, no doubt, jurisdiction either to remove him altogether, or else to appoint guardians with him; but to do that, a case must be made outside the statute, under the general jurisdiction of the Court, which is expressly saved by the last section, 13, of the Act. Here the mother's appointment does not purport to be made under the Act at all. Where a special power, such as this, is given, it must be followed strictly. Not having been followed here, the Act cannot be relied on at all, and the only relief, if

(1) 40 Ch. D. 200.

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any, must be claimed under the general jurisdiction already mentioned. To deprive a father of the custody of his child on the ground of immorality, a case must be made out of gross moral turpitude.

The cases cited on the other side shew that mere incontinence or isolated acts of immorality or drunkenness are not sufficient. "The immorality, to extinguish the right of the parent or guardian to the custody of the child, must be of a gross nature, so that the child would be in serious danger of contamination by living with him": *Reg.* v. *Clarke* (1), cited with approval in *Reg.* v. *Barnardo* (2). The rule as to interference with the father's right to the custody of his child is also fully stated in *Story's* Equity Jurisdiction (3), cited in *In re Goldsworthy* (4). Here no sufficient case is made out against the father.

KEKEWICH, J.:—

This is a summons asking that the nomination of guardians by the will of the mother of the infant may be confirmed by the Court, and that they may be authorized to have the custody of the infant.

Mr. *Warmington* admits that the mother's appointment of guardians cannot be made independently of the father, because sect. 3 of the *Guardianship of Infants Act*, 1886, in which Act this summons is intituled, distinctly provides for the appointment of guardians who are to act "jointly with the father," and not independently of him. The summons seems defective in not recognising the right of the father; but, if need be, it can be amended in that respect. Subject to that, it seems to me the summons is perfectly right.

Now, I must turn to the statute in order to see what its effect is. Before the statute the mother had no testamentary power whatever of appointing guardians, a power which, by an old statute of 12 Car. 2, was vested in the father only. Under the present statute, by sect. 2, the mother, if she survives the father, becomes the guardian of the infant, either alone if no

(1) 7 E. & B. 186, 200.
(2) [1891] 1 Q. B. 194, 199; affirmed [1891] A. C. 388.
(3) 10th Ed. p. 595, § 1341.
(4) 2 Q. B. D. 80.

guardian has been appointed by the father, or jointly with any guardian appointed by him. Then, sect. 3 gives the mother a power of appointing guardians, and contemplates two entirely different cases: first, by sub-sect. 1, it provides for the case of the mother appointing a guardian or guardians of her infant child who shall succeed to the father. That appointment may be made either after the death of the father or in his lifetime, and to take effect after the deaths of the mother and father: guardians may have been appointed by both parents, in which event both sets of guardians are to act jointly. That does not touch the case of guardians appointed by the mother to act during the life of the father; that is provided for by sub-sect. 2. That sub-section is divided into separate parts, and is governed by words which shew the intention of the Legislature with reasonable plainness. In the first place, the mother of the infant "may, by deed or will, provisionally nominate some fit person or persons to act as guardian or guardians of such infant after her death jointly with the father"—that is to say, the guardians so nominated are to act jointly with the father, not alone, and the nomination is only to operate provisionally. Some discussion has taken place as to the meaning of the word "provisionally"; but I do not think it has much meaning with reference to the case before me. The guardians appointed by the mother do not become guardians by the mere act of appointment; the appointment must be confirmed by the Court, and until confirmation by the Court it has no binding effect. No one can say, until it is confirmed by the Court, that the appointment has been actually made, and therefore, in its inception, it is not an appointment; it is only inchoate. Questions may very easily arise as to what may happen pending the confirmation by the Court; but the Court would take care to provide for the custody of the infant, pending the confirmation, possibly by appointing temporary guardians, or it would advance the hearing of the application so as to insure the confirmation being made with all due despatch. I do not think the Court will look into the status of the guardians pending the application for confirmation.

Then the appointment is to be made jointly with the father; that is to say, not otherwise than jointly with him. Then there

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is to be an application for confirmation of the mother's appointment; that is, after her death, for the confirmation cannot take place in her lifetime. Then the appointment is to be confirmed in one state of circumstances only. It must be shewn to the satisfaction of the Court that the father is, for some reason, unfitted to be sole guardian of his children and if the Court is so satisfied it may confirm the appointment of guardians, but jointly with the father.

No doubt, under its general jurisdiction, the Court would have power to consider whether the guardians are proper persons, and would not confirm the appointment if they were unfit persons; but, subject to that, all that the Court is required to decide, in confirming the appointment, is that the father is for some reason unfitted to be "sole" guardian. The words of the sub-section are of the greatest importance. They shew that the father is to be a joint guardian, but they also preserve the general jurisdiction of the Court, which may be exercised by displacing the father altogether, for the concluding words are, "Or make such other order in respect of the guardianship as the Court shall think right." The general jurisdiction is also expressly reserved by sect. 13.

What has happened in the present case is this: The mother, while living apart from the father, makes a will appointing executors and trustees, and then, "so far as I may be able," appoints them guardians of her infant child. In her will she shews what she means by "so far as I may be able," because she refers to the pending proceedings in the Divorce Court, and indicates that those proceedings might possibly invalidate the appointment of guardians. Has she exercised her power under the Act? If not, she had no power to appoint guardians at all, and the will purports to exercise a power which she did not possess. On the other hand, if the will intends to refer to the statute, then she had power to appoint guardians jointly with the father, and to that extent she had power to appoint. Now, in real property law, it is a well-known rule that where a person has a power of appointment, and the instrument purporting to exercise that power can have no meaning unless it is construed as an exercise of the power, then it will be presumed that the intention

was to exercise the power, and the instrument will be construed accordingly, even though the power itself is not referred to.

Applying that rule here, I think the will must be taken as having reference to the statutory power, and that the words used by the testatrix are sufficient to shew that she intended to exercise that or any other statutory power she had. For the reasons I have mentioned, I am of opinion that this lady must be understood to have meant to exercise whatever power the statute gave her and the law allowed her; and that, consequently, she made a good appointment of the two guardians to act jointly with the father.

Now, as I have already said, I think the Court is bound to consider whether the persons appointed as guardians are proper persons to act as such. [His Lordship then went through the evidence on this point, and came to the conclusion that the persons appointed by the will were proper persons to act as guardians. He then proceeded:—] There is only one more observation I have to make upon the 3rd section. It must be shewn to the satisfaction of the Court that the father is for some reason unfitted to be sole guardian. [His Lordship having considered the evidence on this point also, stated that, upon that evidence, he was satisfied that the father was unfit to be sole guardian of his child, and proceeded:—] Therefore, I propose to make an order in the terms of the summons, treating the will as a nomination of these two gentlemen as guardians with the father, and authorizing them to act as such guardians. The rest of the summons will be adjourned into Chambers. It must be understood that I have no intention of interfering with the present custody of the infant.

Solicitors: *H. Nield; Child & Son.*

G. I. F. C.

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1891
Nov. 7.

In re ALLIANCE MARINE ASSURANCE COMPANY.

Company—Memorandum of Association—Alteration of Objects—Extension to New Business—Alteration of Name of Company—Companies (Memorandum of Association) Act, 1890 (53 & 54 *Vict. c.* 62), *s.* 1.

A marine insurance company applied under the provisions of the *Companies (Membrandum of Association) Act,* 1890, for the sanction of the Court to resolutions altering the company's deed of settlement, by extending the objects of the company so as to combine therewith businesses in the nature of life, fire, and accident insurance connected with marine risks. There was evidence that such businesses were commonly transacted by marine insurance companies at the present time, and that they could conveniently or advantageously be combined with the existing business of the company:—

Held, following *In re Foreign and Colonial Government Trust Company* (1), that the proposed alteration ought to be sanctioned only on the condition that the name of the company should be altered in such manner as should be approved of by the Judge in Chambers, so as to indicate to persons dealing with the company the extended nature of the company's business.

PETITION for the sanction of the Court to resolutions which had been passed by the *Alliance Marine Assurance Company,* pursuant to the *Companies (Memorandum of Association) Act,* 1890, that the provisions of the company's deed of settlement should be altered.

By the deed of settlement of the company, which was constituted in 1825, the object and business of the company were defined to be "to grant and effect assurances on British and foreign ships, and goods, and merchandises at sea and on freight, against the perils and dangers of the sea, and all other marine risks, and to lend money on bottomry and respondentia."

By special resolutions of the company, passed on the 28th of July, 1891, it was resolved that the company should be authorized to carry on all or any of the following businesses, in addition to the business authorized by the deed of settlement:—

"(*a*) To insure all vessels and craft afloat, or under construction, repair, or otherwise, and all property and subject matter

(1) [1891] 2 Ch. 395.

of insurance of every description, during transit by sea or land, or on inland waters, and also in or upon any wharves, stores, warehouses, and other places before or after transit, against the risks ordinarily enumerated or contemplated in policies of marine insurance, and also against floods, tidal waves, earthquakes, and other acts of God, delay, theft, civil commotion, strikes, outrages, and losses consequent thereon.

"(*b*) To insure all persons on or about to proceed on voyages and journeys, and all cattle and live stock in course of transit, against all or any of the risks referred to in (*a*) aforesaid, and also against death, injury, accident, or sickness.

"(*c*) To insure all wharves, wharehouses, and waterside stores, and all descriptions of property thereon and therein against all or any consequences of floods, tidal waves, earthquakes, and other acts of God, strikes, outrages, disputes, and civil commotion.

"(*d*) To insure maritime and other contracts of carriage and affreightment, and any profits, emoluments, and payments thereunder, against all or any of the risks referred to in (*a*) aforesaid.

"(*e*) To indemnify shipowners, carriers by water, and other persons entrusted with the carriage of property by water, against liabilities incurred in the course of their business, in respect of loss of or damage to property, or of personal injury or loss of life.

"(*f*) To lend money on bottomry and respondentia, and to provide bail, and to give security by bond or otherwise, for the purpose of preventing the arrest or effecting the release from arrest of vessels, cargoes, and freights wholly or in part insured with the company.

"(*g*) To insure all property or subject matters of insurance on land against fire, and all or any of the risks in (*a*) and (*b*) aforesaid, when the said risks are covered, in conjunction with sea or transit risks, to and from the place or places at which such property or subject matters of insurance are landed, stored, or deposited.

"(*h*) To do all such other things as are incidental or conducive to the above objects or any of them."

In support of the petition there was an affidavit by Baron

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Rothschild, stating that the businesses contemplated by the resolutions were commonly accepted and undertaken by marine insurance companies and persons engaged in the business of marine insurance, could at any time, if so required, be readily placed or effected with such marine assurance companies and persons, and could be conveniently and advantageously combined with the present business of the company. There were also affidavits to the like effect by the underwriter to the *London Assurance*, speaking from thirty-two years' experience, and by other persons.

Warmington, Q.C., and *Theobald*, in support of the petition, referred to six cases in which similar alterations in the case of other marine insurance companies had been sanctioned by the Vice-Chancellor of the Palatine of Lancaster, and to one similar case decided in Ireland.

[Mr. Justice KEKEWICH:—What you ask for is clearly a very large extension of the company's business, and a conversion of the company, to some extent into a life, fire, and accident insurance company. In the case of *In re Foreign and Colonial Government Trust Company* (1), where extensive alterations were sanctioned, *Stirling*, J., required that the name of the company should be changed, so as to indicate the extensive character of the alterations.]

In that case a company, the name of which indicated that its business was confined to foreign and colonial investments, was allowed to combine therewith investments of a general character, and retention of the name unaltered would have been misleading. That case is entirely unlike the present, as it is proved that all that this company now desires to do is commonly done by marine insurance companies at the present day. A change of name, therefore, would convey no real information to the public, and ought not to be required. It was not required in any of the seven cases already referred to.

[They referred also to *In re Governments Stock Investment Company* (2).]

(1) [1891] 2 Ch. 395. (2) [1891] 1 Ch. 649.

KEKEWICH, J.:—

I have no hesitation in making the order; that is to say, in allowing this company to modify its memorandum of association by enlargement in the way proposed; but it is important to observe why I do it. I may do it according to the 5th sub-section of sect. 1 of the Act of 1890, when certain things concur. They are classified under the heads (*a*), (*b*), (*c*), (*d*), and (*e*). It seems to me that (*d*), and if not (*d*) only, at any rate (*d*) mainly, is the paragraph of the sub-section on which I must rest.

The company is a marine insurance company. I have the statement of its objects from its deed of settlement, and the petition before me, and what is there shortly stated is the business of a marine insurance company. The general words used are "all other marine risks." Therefore it does not seem to me that I can be asked to enable this company to carry on its business "more economically or efficiently" because in terms and in substance I am asked to allow it to do something which is beyond marine insurance. Clause (*b*) is inapplicable, and so also is clause (*c*). What I am asked to do is, in the words of clause (*d*), to allow it to carry on "some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company," that is, to do something beyond what is strictly marine insurance. It is urged and proved that nowadays in 1891 A.D., marine insurance companies do business of the character which this company desires to do, that what is strictly marine insurance is carried on in conjunction with business of a different character, and that this more extended business may be under existing circumstances conveniently or advantageously combined with the business of marine insurance. But what is combined is not the business of the company, but something which is added to it, and it is important to bear that in mind. The company are not here to ask me to authorize something which they can do, but something which they cannot do, something which can be advantageously combined with that which they can do. And that appears when the details are looked at. It is not necessary to look at all the paragraphs of the proposed memorandum, but I will take two by way of example. There is a power to insure life—no doubt, life

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in connection with marine risks—but life in addition to marine insurance; and not only life, but accident, that is to say, a power trenching on the business of a life insurance company, and trenching also on the business of an accident insurance company, and then, further on, it is proposed to accept also fire risks —fire risks, no doubt, in connection with water risks—but still making it, in the acceptance of fire-risks, an entirely new business. It is the basis of my judgment that it is not sufficient to say that these are businesses now usually carried on by marine insurance companies. That I accept as true; but they are also businesses to be carried on by this marine insurance company, not because they are marine insurance, but because they can conveniently or advantageously be combined with marine insurance. In the case of *In re Foreign and Colonial Government Trust Company* (1), Mr. Justice *Stirling*, while confirming the alteration of the memorandum of association, expressed a strong opinion that the name of the company ought to be altered, because the name *Foreign and Colonial Government Trust Company* did not indicate to the public and to persons dealing with the company such an extension of the investments as was proposed. That is to say, they were going to introduce these different investments of a home character, in addition to foreign and colonial investments, and persons dealing with the company would be misled or might be misled. In the passage I referred to (2) he says: "The company is now taking wider powers, and I think it ought to alter its name so that it may not mislead, or be liable to mislead persons who deal with the company, but do not take the trouble to examine the memorandum of association as altered." Applying that to this marine insurance company, I say that persons dealing with this company under its existing name will not know that the company is undertaking these businesses of life, accident, and fire insurance. It is convenient for this company engaging in business with other companies who deal in this wider business, and convenient also for persons dealing with this company to effect an insurance against accident or fire without the intervention of other offices, and it may be taken to be generally convenient for the company and

(1) [1891] 2 Ch. 395. (2) [1891] 2 Ch. 400.

those dealing with it that the business should be extended; but it is, at least, possible that persons dealing with the company might think that for marine insurance they would rather go to a marine insurance company, for accident, to an accident insurance company, and so as regards fire and life, and it does seem to me that to leave this company standing as the *Alliance Marine Assurance Company*, and to enable it to insure life, to insure against accident, and to insure against fire, even though connected with water risk is just to do the very thing which Mr. Justice *Stirling* said ought not to be done. I have been referred to several cases before the Vice-Chancellor *Bristowe*, and one in *Ireland*, where marine insurance companies have enlarged their powers with the sanction of the Court, and apparently in those cases no such alteration was insisted on. I have looked to see what enlargements were made in those different cases, and I find that in some they were rather narrower than those submitted to me, but in some they were wider; and they were cases in which, according to my opinion, the name should have been altered. I should be unwilling to depart from what has been held even by a Court whose decision is not binding upon me, but it is not stated that Mr. Justice *Stirling's* decision was before the other Courts, and having that decision before me, being even more unwilling to depart from that, and indeed distinctly approving it, I ought not to allow the order for confirmation of the resolution to operate until the name has been altered. I will therefore sanction the proposed alterations of the memorandum; but the order for confirmation will not be operative until the company shall have altered its name in such a way as may be approved of by me in chambers.

Solicitors: *Waltons, Johnson, & Bubb.*

C. C. M. D.

KEKEWICH, J.

1891
Dec. 5, 12.

In re NATIONAL BOILER INSURANCE COMPANY.

Company—Memorandum of Association—Alteration of Objects—Extension to New Business—Powers of the Court—Companies (Memorandum of Association) Act, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub-s.* 5, *clause (d).*

In exercising the powers conferred by sect. 1, sub-sect. 5, clause (d) of the *Companies (Memorandum of Association) Act,* 1890, the Court should regard as convenient and advantageous those things which experience and the opinions of traders reasonably shew to be of that character.

A company formed mainly for the purpose of insuring against risks by explosion of steam boilers, applied for the sanction of the Court to resolutions altering the company's memorandum of association by very largely extending the objects of the company in such a way as to combine with its existing business other business of an independent though not unconnected character. There was evidence shewing that in the view of the persons best qualified to form an opinion the proposed extension was to the advantage of the company:—

Held, that the proposed alteration of the memorandum of association ought to be sanctioned, but upon the terms that the name of the company should be altered, in such manner as should be approved of by the judge, so as to indicate the extensive change in the character of the business which was being effected, that the new objects should not have practical effect until subsisting policies had expired or the holders thereof had given their assent, and that provisions of the altered memorandum which appeared to the Court to transgress the reasonable limits of combination should be modified or omitted.

PETITION of the *National Boiler Insurance Company* for the sanction of the Court to resolutions which had been passed for the alteration of the company's memorandum of association.

By clause 3 of the company's memorandum of association, the objects for which the company was established were declared to be: the carrying on of the business of a company for the insurance of every kind of steam boilers against the risk of explosion, and for the insurance also of property and life against the risk of damage consequent upon the explosion of such boilers; the purchasing and working certain letters patents for improvements in furnaces and boilers for the generation of steam, and in the fusible plug or safety valve made use of to prevent danger or injury to boilers by deficiency of water; the manufacturing and selling such fusible plug or safety valve, and the granting

licences for the manufacture or use of the same; the manufacturing and working or granting licences for the manufacture or use of the other parts of the invention described in the letters patent; the purchasing or otherwise acquiring and working and granting licences for the use of any patent or other safety valve, or invention, instrument or contrivance intended to effect or answer a similar object or use in diminishing the risk of explosions of steam boilers; the purchasing or otherwise acquiring and working any other invention or inventions for any purpose relating to furnaces, steam boilers or engines; the indication, examination, and inspection of steam boilers and engines, and the employing agents to inspect the same, and advise owners of steam power on economising the raising of steam and the using of steam power; and the doing all such other things as were incidental or conducive to the objects aforesaid, or any of them.

By special resolutions of the company passed on the 11th of August, 1891, it was resolved that clause 3 of the memorandum of association should be altered so as to include in the objects for which the company was established the following, namely:—

"A.—To insure,—

(*a*) Steam engines, gas engines, and every other kind of engine that is now or may hereafter become known,

(*b*) All kinds of boilers and generators, and any machinery, appliances, or things used to produce motive power or in connection with motive power,

(*c*) Any machinery, apparatus, or plant whatever,

(*d*) Any buildings in which any engines, boilers, generators, machinery, appliances, apparatus, plant, or things as aforesaid may be, and

(*e*) Any property of any kind whatever,

against loss or damage caused by, or arising in consequence of, any explosion, collapse, breakdown, or other occurrence of an injurious or accidental nature of or to any engine, boiler, generator, machinery, appliance, or thing used to produce motive power, or used in connection with motive power, or used for any other purpose, and against loss or damage arising from, or in consequence of, or by reason of electricity or galvanism, or any

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other force now known, or hereafter to become known, or any combination or combinations thereof, [and against loss or damage arising from fire, accidental or otherwise, or from storm, tempest, or other unforeseen or accidental injury, and to issue policies effecting all or any one or more of the foregoing objects.]

B.—To carry on the business of insurance against death or personal injury by accident, and to grant and issue policies of insurance to any person against or upon the contingency of death or personal injury, and either assuring or not assuring payment during sickness or incapacity, in case such death, personal injury, sickness, or incapacity arises from any accident.

C.—To ensure employers of labour against any claim by any of their employees, either under the *Employers Liability Act*, 1880, or otherwise, for or on account of any injury caused by any explosion, collapse, breakdown, accident, or other occurrence specified in the policy of assurance.

D.—To examine, indicate, and advise respecting, not only steam boilers and steam engines, but any other kind of boiler or engine, and any generators, machinery, motive power, apparatus, plant, or appliance aforementioned, and any buildings or works, and to grant certificates, accompanied or not by a guarantee of the condition, sufficiency, efficiency, power, capacity, or safety thereof respectively or otherwise, either with or without making a special charge therefor.

E.—To purchase or otherwise acquire and to work and to grant licenses for the use of any letters patent, invention, instrument, or contrivance for manufacturing, improving, diminishing the risk of injury of any kind to or from, or in any other way relating to, any engine, boiler, generator, machinery, appliance, or thing such as before mentioned, and to manufacture, sell, supply on hire, affix, set up, and repair any invention, instrument, or contrivance as aforesaid, and any engine, boiler, generator, machinery, appliance, and thing as aforesaid.

F.—To acquire any license to manufacture, use, sell, or grant the use of any such invention or patent as aforesaid.

[G.—To examine for reward any person who is, or may be, or proposes to be, employed in any capacity whatever in or about

the management or working of any engine, boiler, generator, machinery, appliance, or thing as aforesaid, and to grant certificates of the result of any such examination, shewing the competency and fitness of the person examined for any kind of employment.]

H.—To re-insure or divide with any other company or companies any responsibility or risk undertaken by this company, and to join in any responsibility or risk undertaken by any other company or companies.

I.—To purchase, take on lease, mortgage, demise, or sell any lands, and to erect, pull down, or alter any buildings deemed convenient for the purposes of the company.

The nature of the evidence adduced in support of the petition sufficiently appears from the judgment.

Renshaw, Q.C., and *R. F. Norton*, for the Petitioners, referred to *In re Governments Stock Investment Company* (1); *In re Foreign and Colonial Government Trust Company* (2); *In re Alliance Marine Assurance Company* (3).

In reply to questions from the Court, they stated that the company were willing to make any change in their name which should be considered satisfactory by the Court, to undertake that the powers newly conferred should not be exercised until the existing policies had expired, or the consent of the policy holders had been obtained, and to amend the resolution by omitting therefrom the portions thereof enclosed above in square brackets.

1891. Dec. 12. KEKEWICH, J.:—

The proposed alterations of the memorandum of association cannot be confirmed unless the Court is satisfied that they fall within the legitimate meaning of sect. 1, sub-sect. 5, clause (*d*) of the *Companies* (*Memorandum of Association*) *Act*, 1890. That clause must have been discussed on some other of the many applications under the Act, and it was carefully considered by myself on the application of the *Apollinaris Water Company*, which

(1) [1891] 1 Ch. 649. (2) [1891] 2 Ch. 395.
(3) *Ante*, p. 300.

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proposed extensive, but, in my judgment, proper alterations of their memorandum of association. But so far as I am aware, there is no judicial decision on the meaning of the clause, or on the limits of the effect which ought to be given to it by the Court. Many observations of *Chitty*, J., in *In re Governments Stock Investment Company* (1) bear, and I think intentionally bear, on the subject; but we have the Judge's own authority that the case did not fall within the particular clause which I have now to consider. Fortunately, I am not obliged to say what limit, for notwithstanding the general language, I suppose there must be some limit which ought to be placed on the meaning of the clause. One is familiar with universal emporia. One is familiar also with memoranda of association so framed as to lead to the conclusion, as noticed by Mr. Justice *Chitty*, that the companies with which they are connected are formed merely for the acquisition of gain, and some even invite the addition "by whatever means." The legislature cannot have intended so much as that, but I think it must be taken to have intended that the Court should regard as convenient and advantageous what experience and the opinions of traders reasonably shew to be of that character.

In support of the present application, I have three things all deserving consideration: 1st, the evidence of men connected with this particular company to the effect that the establishment of the departments of business sought to be combined with those now existing is provoked by inquiries from their customers, and that they believe such establishment will result in trade profitable to the company; 2ndly, a decision of the Court of Session confirming alterations of the memorandum of association of another like company substantially the same as those which I am asked to approve; and 3rdly, the fact that at least two other like companies have memoranda of association embodying such alterations. Without at all disparaging the first and second, I attribute much weight to the third head, and not the less so because I observe that in each case the company having the extensive objects which I have mentioned is the successor of another company, which I conclude, without proof, had objects

(1) [1891] 1 Ch. 649.

of a narrower character. It was stated at the bar, and I accepted the statement, that they were formed by the process commonly known as reconstruction. All things considered, it is impossible to resist the conclusion that in the view of men best qualified to form an opinion, it is to the advantage of a company carrying on such a business as that carried on by the one before me to combine with it other business of an independent though not unconnected character, and that what is advantageous in this respect is likewise found convenient.

Mr. *Renshaw*, on behalf of the company, expressed willingness to modify two provisions of the altered memorandum of association, which apparently transgress the reasonable limit of combination. He also anticipated my requirement that the name of the company should be altered so as to indicate the enormous change in the character of its business which is now proposed to be effected. This is according to Mr. Justice *Stirling's* decision in *In re Foreign and Colonial Government Trust Company* (1), which having recently followed it in *In re Alliance Marine Assurance Company* (2), I need not again discuss, and Mr. *Renshaw* suggested the introduction of the word "general" for this purpose. That would satisfy me. He also offered that the new objects should not have practical effect until subsisting policies had expired, or the holders thereof had given their assent to the change, and this also I think satisfactory. The result is, that the order confirming the alteration of the memorandum of association cannot now be made.

In form the petition will stand over with liberty to amend, so that these modifications may be authorized by the company and stated on the petition, but that once done the order of confirmation will go without further discussion.

His Lordship added that the alteration of the name could not be effected without the sanction of the Board of Trade, and that it was of course possible that that Board might not sanction the proposed alteration. In the case of *In re Alliance Marine Assurance Company*, two names had been submitted to his

(1) [1891] 2 Ch. 395. (2) *Ante*, p. 300.

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Lordship, and while thoroughly approving one, he, though with some reluctance, approved the other also, only because he was told that the Board of Trade would like to have a choice of names.

Solicitor: *T. P. Dixon*, agent for *Needham, Parkinson & Slack, Manchester.*

C. C. M. D.

COMPTON *v.* BAGLEY.

ROMER, J.

1891

Dec. 4, 5.

[1891 C. 253.]

Vendor and Purchaser—Abstract of Title—Reasonable Time for Delivery—Notice fixing Time—Making Time of Essence of Contract—Rescinding Contract.

On the 25th of August, 1890, a contract was entered into for the sale of a farm, of which the purchaser was to have personal possession at or soon after Michaelmas, 1890. The contract provided for the delivery of an abstract of title, but was silent as to the period within which such delivery was to take place.

Some abstracts were sent on the 27th of August, but (as was pointed out by the purchaser's solicitors on the 30th of August) the title to a part of the property was not then properly shewn. After another request for a further abstract the deeds in the vendor's possession were sent to the purchaser's solicitors on the 4th of September.

After further requests for the title the purchaser's solicitors, on the 13th of October, gave the vendor's solicitor a notice in writing that unless a proper abstract was sent within fourteen days the purchaser would treat the contract as at an end, and require a return of his deposit and damages for the breach of contract.

On the 16th of October the vendor's solicitor sent an abstract of title, but this (as pointed out by the purchaser's solicitors on the 20th of October) did not refer to the title called for.

No abstract of this title was sent until the 29th of November, and on the 2nd of December all the abstracts were returned to the vendor's solicitor. The purchaser shortly afterwards brought an action for the return of his deposit and for damages:—

Held, that the period of fourteen days, mentioned in the notice of the 13th of October, was a reasonable period within which to require delivery of a proper abstract; and that, no proper abstract being delivered within that period, the purchaser was entitled to rescind the contract and recover his deposit and the expenses of investigating the title.

ON the 23rd of August, 1890, *A. H. Compton* wrote to *J. Bagley* offering to buy a farm called *Belchambers*, in the county of *Sussex*, for £2700, "provided only that my solicitors will accept the title, which I should be much obliged if you will kindly post to Messrs. *Aston, Harwood*, and *Wright*, 2, *Cooper Street, Manchester*, for their perusal. I will send you a remittance for £500 on account by next Tuesday week, and pay the balance of the £2700 and the valuation on taking possession. Can you

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manage to go out by Michaelmas? I should like to get in then, if possible, so as to move my stock straight from the place I am leaving."

On the 25th of August, 1890, *J. Bagley* replied, accepting the offer, and suggesting that the purchaser's solicitors should come over and peruse the deeds, or employ a local solicitor to do so; and stating that he should be able to get out by Michaelmas if the purchaser took to the corn, or by the first week in October.

On the 27th of August, 1890, Messrs. *Aston*, *Harwood*, and *Wright*, the purchaser's solicitors, wrote to the vendor, asking him to send all the abstracts which were with the title deeds. Two abstracts of title were sent by the vendor on the following day.

On the 30th of August, 1890, the purchaser's solicitors wrote to the vendor as follows:—

"We are in receipt of your letter enclosing two abstracts of title. We shall be glad if you will search among the deeds for other abstracts, as the first of these relates partly to copyholds, and the other part to sixteen acres only of freeholds, and the last deed is dated 1793. The second abstract shews no link between it and the first, and the first deed recited is dated 1867. There should be an abstract of deeds between these dates. The second abstract ends with a deed dated 1887. Since that we presume there is only the conveyance to yourself. Please send us an abstract of any later deeds (including such conveyance to yourself), or, if you prefer it, send the later deeds themselves."

On the 1st of September, 1890, the purchaser's solicitors sent the deposit of £500 to the vendor.

On the same day the vendor sent the purchaser's solicitors a schedule of the deeds, and on the 3rd of September, 1890, he sent them a receipt for the deposit, which concluded as follows:—"The deposit to be returned and the contract at an end if the title is not satisfactory."

The purchaser's solicitors again wrote for a further abstract on the 2nd of September, 1890, and on the 4th of September, 1890, the vendor replied, stating that he had been to see his solicitor, Mr. *Daintrey*, but that he was away for his holidays, and

that he (the vendor) sent therewith the whole of the deeds and papers in his possession.

Some further correspondence ensued between the purchaser's solicitors and Mr. *Daintrey*, the vendor's solicitor (who had at length returned from his holidays), with reference to an alleged claim to the property, or part of it, by a Mr. *Cave*, and on the 15th of September, 1890, the purchaser's solicitors wrote to Mr. *Daintrey* stating that, with reference to the title to the manor of *Slindon* (which was freehold), they had no abstract and no knowledge of the title deeds otherwise than through a covenant to produce a great number of deeds, and asking whether the vendor's solicitor could assist them with the loan of any abstract or outline of these.

On the 17th of September, 1890, the vendor's solicitor wrote to the purchaser's solicitors asking them to return the deeds (in pursuance of an inclosed authority from the vendor), and stating that he would then make the abstract complete.

On the 18th of September, 1890, the purchaser's solicitors sent all the deeds of which an abstract had not been sent to them. The letter continued as follows: "May we ask you to reply to the question in our last as to the title deeds relating to the manor before the purchase of the copyhold interest in 1873? We should be glad to see an abstract or outline of these, even if it were only of those covenanted to be produced."

On the 22nd of September, 1890, the purchaser's solicitors wrote as follows: "Will you please answer our inquiry whether you have seen the title deeds of the manor of *Slindon* before the purchase of the copyhold interest in 1873. Have you any information as to a settlement of 1812? Such a deed is alleged to exist and is not included in the covenant to produce contained in the conveyance from *Leslie's* trustees. The sooner you are able to send us the full abstract, the sooner we can advise our client."

Some further correspondence ensued, and the vendor's solicitor, on the 30th of September and the 6th of October, 1890, asked to have the deeds sent back.

No further abstract being sent, the purchaser's solicitors wrote to the vendor's solicitor on the 13th of October, 1890, returning

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the rest of the deeds and concluding as follows: "The purchaser requires the delivery of a proper abstract and within fourteen days of this date, and in default he will treat the contract as at an end, and call upon the vendor for a return of his deposit and damages for breach of contract."

On the 14th of October, 1890, the vendor himself wrote to the purchaser's solicitors complaining of the delay, and stating that the title was good and had nothing to do with the *Slindon* estate.

On the 16th of October, 1890, the vendor's solicitor sent the purchaser's solicitors an abstract of title, and on the 20th of October, 1890, they replied that the abstract did not "disclose a proper title to the freehold (that is, the manor of *Slindon*)," and stating that they reserved their requisitions and all their client's rights, and referred the vendor's solicitor to their letter of the 13th of October.

The vendor's solicitor replied on the 22nd of October, 1890, asking the purchaser's solicitors "to make requisitions in the ordinary course, so that they can, if necessary, be submitted to the decision of the Court," and asking that the requisitions might be sent at once.

No complete abstract was, however, sent until the 29th of November, 1890, when the vendor's solicitor returned the abstracts (which had been sent him by the purchaser's solicitors) completed, and an abstract of the title to *Slindon* manor.

The abstracts were all returned by the purchaser's solicitors on the 2nd of December, 1890, and on the 17th of January, 1891, the purchaser commenced the present action against the vendor, claiming repayment of the deposit of £500 with interest, and £250 damages for breach of the contract.

By his statement of defence the vendor admitted a contract for sale of the farm for £2700, but denied that it was of the essence or any part of the contract that the purchase should be completed or possession should be given by the first week in October. The vendor denied that he had been guilty of any neglect in supplying an abstract of title, and alleged that he had furnished a proper abstract and deduced a good title; and he counter-claimed for specific performance of the contract, and damages.

Neville, Q.C., and *Radford*, for the Plaintiff:—

Express notice will make time of the essence of the contract where no time is specified in the original contract, but a time is specified in the notice, and such a notice may be given where an abstract has not been perfected, so as to place the purchaser in a position to rescind the contract: *Stewart* v. *Smith* (1).

There is not much authority on the question within what time an abstract ought to be delivered, but it seems clear that the vendor is, independently of any condition, bound to deliver an abstract, and that delivery of the title deeds is not sufficient: *Dart's* Vendors and Purchasers (2). The only question is whether the period of fourteen days allowed in this case for delivery of the abstract of the freehold title was reasonable. It is quite clear that the vendor knew the purchaser was to come into personal possession of the property at or soon after Michaelmas, 1890. It is a matter of common knowledge that a period of fourteen days from the date of sale is frequently mentioned in conditions of sale as that in which the abstract is to be delivered; and, under all the circumstances, the period allowed was a reasonable one.

If the Plaintiff is right, he is entitled to have his deposit returned with interest. He is also entitled, as damages, to payment of the expenses which he has incurred in investigating the title: *Bain* v. *Fothergill* (3).

Chadwyck Healey, Q.C., and *Ingpen*, for the Defendant:—

The time allowed for sending the abstract was too short. Where a vendor had delayed completion for two years and then gave the purchaser notice to complete within three weeks, Mr. Justice *Fry* held the time limited to be too short, and that the notice had no effect: *Green* v. *Sevin* (4). A notice given on the 24th of September to complete a purchase on or before the 31st of October was also held by the same Judge to fix an unreasonably short time and to be invalid: *Crawford* v. *Toogood* (5). It was there pointed out that the question whether the notice is

(1) 6 Hare, 222, n.
(2) 6th Ed. p. 141.
(3) Law Rep. 7 H. L. 158.
(4) 13 Ch. D. 589.
(5) 13 Ch. D. 153.

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reasonable or not must be judged of as at the time when it is given. The Plaintiff's solicitors made no reference to the manor of *Slindon* until they wrote their letter of the 15th of September, and at that time neither of the parties was alive to the deficiencies of the abstract. Before the Defendant's solicitor could say what was a proper abstract, he was entitled to have all, or at any rate some of, the deeds back from the purchaser's solicitors. Where a purchaser's solicitor gave notice that unless a settlement forming part of the title was produced in fourteen days he should treat the contract of sale as at an end and require a return of the deposit, it was held that the time specified was unreasonably short: *Parkin* v. *Thorold* (1). And where a vendor was bound to furnish a certain declaration, and furnished an insufficient one, and the purchaser gave him notice that unless a proper declaration was furnished within a fortnight he would rescind the contract, on the vendor making default, the purchaser was held entitled to put an end to the contract; but the decision was on the ground of the vendor having, before notice given, positively refused to furnish any further evidence; *Romilly*, M.R., agreeing with *Parkin* v. *Thorold*, and saying that "if the defendant had said 'If you do not complete within fourteen days I will rescind the contract,' that would not have been sufficient": *Nott* v. *Riccard* (2). There was no such previous refusal in the present case, and, under all the circumstances, the notice was insufficient.

ROMER, J.:—

In my opinion, the Plaintiff is entitled to succeed.

The question which must first be considered is, What was the subject of the contract for sale? It was a farm, and it was clearly in the contemplation of the parties that the purchaser was personally going into possession, and that the purchase should be completed so as to allow of his entering into possession at Michaelmas or soon after. Well, what happened? Through the Defendant's default no proper abstract of title at all was delivered for some time. That was the Defendant's own fault or misfortune, his solicitor being away for the time on his holidays.

(1) 16 Beav. 59. (2) 22 Beav. 307, 311.

After considerable difficulty and delay the Plaintiff's solicitors were able to get some deeds delivered, from which some kind of an abstract was made, and some abstracts were also sent. But from the beginning of the negotiations till the rescission of the contract no title to the freehold of the property, before the copyhold portion was bought, was obtained. The necessity for the freehold title being shewn was pointed out at an early period by the solicitors for the purchaser, in their letter of the 30th of August, 1890, by which an abstract of such title was required. The Plaintiff's advisers behaved at this period with great forbearance in dealing with the Defendant, and it ought not to be urged against them, as it has been, that the tone of their letter does not become peremptory till later on, but that their request for a further title was made in a conciliatory and amicable manner. Still no abstract was delivered, and that through no default of the Plaintiff. More delay ensued owing to the fact of the Defendant and his adviser not being ready, and on the 15th of September the purchaser's solicitors, writing to the vendor's solicitor, pointed to the title of the freehold, and said they had no abstract and no knowledge of the deeds except through a covenant to produce, and asked for the loan of an abstract. Notwithstanding this, no further abstract was delivered, and, as I have already said, that was not through the fault of the Plaintiff.

Again, on the 18th of September the Plaintiff's solicitors asked for the attention of the Defendant's solicitor, and said they should be glad to see an abstract or outline of the deeds relating to the freehold title, even if it were only of those covenanted to be produced. Again, on the 22nd of September the Plaintiff's solicitors wrote asking for an answer to their inquiry whether the Defendant's solicitor had seen the title deeds before the purchase of the copyhold interest in 1873, and saying, "The sooner you are able to send us the full abstract, the sooner we can advise our client."

Notwithstanding this, no attention whatever was paid by the Defendant or his solicitor to the demand for the freehold title.

Studiously almost, as it were, the demand was disregarded, polite though it was. Meanwhile the time ran on, and on the 13th of October, 1890, the Plaintiff's solicitors had already waited

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longer than they could within reason have been asked to do, and, Michaelmas Day being already past, it was clear that, unless their client was to suffer loss, they ought to have the abstract forthwith. On that day they wrote requiring delivery of a proper abstract within fourteen days, and threatened, if it was not so delivered, to rescind the contract.

The way in which that letter was met throws a light on the Defendant's previous conduct. How was the demand of the 13th of October met? First by a letter of the Defendant himself complaining of the Plaintiff's delay, and saying that the title was good and had nothing to do with the entailed estate. But, more than that, when the Defendant's solicitor does act at all, what does he do? Does he say that there is a difficulty in getting the further title, or that he has had a difficulty in framing the abstract but will furnish it speedily? Nothing of the sort. He ignores the request for the freehold title, and treats it as a demand which ought not to have been made.

On the 16th of October he sent what he is pleased to call the abstract of title, as if in complete answer to the demand, but which abstract entirely ignores the freehold property, as was pointed out by the letter of the purchaser's solicitors of the 20th of October.

The fourteen days elapsed, and nothing more was done. Some further correspondence followed—but nothing to prevent the Plaintiff from standing to his position taken up in the letter of the 13th of October, 1890—and it was not until the 29th of November that, without further communication, an abstract of the freehold title was sent.

That came too late, seeing that up to that time the position practically taken up by the Defendant was that the freehold title would not be supplied.

It is said that a period of fourteen days is too short a time to be allowed for the delivery of the abstract. In considering whether it was too short or not, one must consider the whole of the circumstances, including the nature of the property sold. I consider the fact that it was important to the purchaser that possession was to be given at or soon after Michaelmas. I regard what it was that the Plaintiff asked the Defendant to do,

which was merely to deliver a further abstract, which it was the Defendant's bounden duty to deliver within a reasonable time after the contract was entered into. In ascertaining whether fourteen days was a sufficient time, I have also to consider the previous requests of the purchaser, that those requests had been ignored by the vendor, and that when the final request was peremptorily made there was in substance a refusal to deal with the freehold title at all or furnish an abstract. I cannot see myself that fourteen days was too short a time under the circumstances, bearing in mind that it is a vendor's duty to deliver an abstract, and that fourteen days is about the time usually required, after a contract, within which the whole abstract is required to be produced. I therefore hold that the Defendant is not now entitled to hold the Plaintiff to his bargain.

I order the Defendant to repay to the Plaintiff the deposit of £500, with interest at 4 per cent. And he must also pay damages for his breach of contract, but such damages will be limited to the amount of costs which the Plaintiff will have to pay to his solicitor for investigating the title. These costs will have to be taxed, and there must be liberty to apply for payment when the taxation is completed. The Defendant must pay the costs of the action, and his counter-claim will be dismissed with costs.

Solicitors for the Plaintiff: *Bower, Cotton, & Bower*, for *Aston & Harwood, Manchester.*

Solicitors for the Defendant: *Parish & Hickson*, for *C. J. Daintrey, Petworth.*

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In re NORTH AUSTRALIAN TERRITORY COMPANY.

ARCHER'S CASE.

Company—Director—Liability—Principal and Agent—Qualification Shares—Indemnity—Insurance against Loss—Promoter—Contract between Director and Promoter—Secret Agreement—Secret Profit—Misfeasance—Breach of Trust—Loss to the Company—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 165 [*Revised Ed. Statutes, vol. xiv., p.* 238]—*Companies* (*Winding-up*) *Act,* 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

A., being requested by the promoter of a projected company to become a director, agreed to do so upon the terms that, if he should at any time desire to part with the shares which he was to take in order to qualify him as director, the promoter should purchase them from him at the price which he should pay for them. The company was subsequently formed, and *A.* became a director, took the qualification shares, and paid for them at par out of his own money, and from time to time acted as director; but he never disclosed to his co-directors or to the company the existence of his agreement with the promoter. He afterwards resigned his office of director, and subsequently to his resignation the promoter at his request paid to him the sum which he paid for the shares, and accepted a transfer of them. At that time the shares were valueless in the market. In the winding-up of the company the liquidators took out a summons under s. 10 of the *Companies* (*Winding-up*) *Act,* 1890 (a section substituted for the similar section, 165, of the *Companies Act,* 1862), asking that *A.* might be declared guilty of misfeasance or breach of trust in relation to the company in entering into the agreement with the promoter, and might be ordered to pay to the liquidators the sum received by him from the promoter, with interest:—

Held (reversing *Kekewich,* J.), that, having regard to *A.'s* position as director of, and therefore agent for, the company, whatever benefit or profit accrued to him under the indemnity constituted by his secret agreement with the promoter belonged to the company, and that the retention by him of the proceeds of the indemnity occasioned a loss to the company for which he was accountable, with interest, upon the principle of *Hay's Case* (1) and *Pearson's Case* (2).

Bentinck v. *Fenn* (3) distinguished.

ADJOURNED SUMMONS.

The *North Australian Territory Company* was incorporated by registration under the *Companies Act,* 1862, on the 18th of May, 1887, with a nominal capital of £300,000 in shares of £10 each; one of the objects of the company being stated in the memo-

(1) Law Rep. 10 Ch. 593. (2) 5 Ch. D. 336.
(3) 12 App. Cas. 652.

randum of association to be to carry into effect an agreement between *Charles Brown Fisher* (the vendor of the company) and one *Adams*, as trustee for the company, for the purchase of certain lands in *Australia*. By the articles of association the qualification of a director was the holding of fifty fully paid-up shares. The Respondent, *Thomas Archer*, was one of the first directors of the company, and a holder of fifty shares of £10 each.

The circumstances under which *Archer* became a director and shareholder were as follows. He was the owner of estates in *Queensland*, and had acted as agent-general for that colony when his party was in power. In 1887, when he was in *England*, he received a letter from Mr. *Robert Murray Smith*, who was a promoter of the company, then in course of formation, and also the agent of *Fisher*, the vendor, asking him to join the board of directors of the company. *Archer* at first expressed himself unwilling to become a director, on the grounds, amongst others, that he had no acquaintance with business, and that at any moment he might have to go to *Queensland* either on his private affairs or on the service of the colony. Some correspondence ensued, in the course of which *R. Murray Smith* acknowledged, in a letter dated the 3rd of May, 1887, that he was a promoter of the company; and on the 13th of May, 1887, *R. Murray Smith*, in reply to a suggestion by *Archer* that in case he became a director he should be relieved of his shares upon leaving the board at any time, wrote to *Archer* a letter as follows: "Dear Sir,—Should you desire at any time to part with the fifty shares in the *North Australian Territory Company* which you are about to take, I undertake to purchase them from you at the same price which you pay for them." That letter was accompanied by another, in which *R. Murray Smith* said, in reference to the undertaking: "You need not say anything about it. It is a private arrangement between us."

On the 18th of May, 1887, as above stated, the company was incorporated. On the same day *Archer* became a director, and on the 31st of May, 1887, fifty shares were allotted to him, for which he paid £500. It was not disputed that he paid this sum out of his own money.

Archer acted as director of the company until the 25th of

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June, 1888, when he resigned his seat on the board in consequence of his again being appointed agent-general for the colony of *Queensland*. On the 3rd of July, 1888, his resignation was accepted.

On the 22nd of November, 1888, upon a request by *Archer* to carry out the undertaking contained in the letter of the 13th of May, 1887, *R. Murray Smith* purchased the fifty shares from him for £500. The transfer of the shares was executed, but not registered. At that time the shares were practically valueless in the market.

On the 9th of August, 1889, resolutions were passed for the voluntary winding-up of the company; and on the 22nd of February, 1890, an order was made continuing the winding-up under the supervision of the Court.

This was a summons by the liquidators of the company, under sect. 10 of the *Companies (Winding-up) Act*, 1890—an enactment substituted for sect. 165 of the *Companies Act*, 1862, and in almost similar terms—asking that it might be declared that *Archer* was guilty of misfeasance or breach of trust in relation to the company in entering into an agreement with its promoter for the purchase at par by the promoter from *Archer*, and at his request, of the fifty qualification shares, and that he, *Archer*, might be ordered to pay to the applicants, as such liquidators, within four days after the service upon him of the order to be made on the application, the sum of £500 received by him from the promoter under such agreement, with interest from the date of receipt of such sum by him until payment.

Archer was examined by the liquidator under sect. 115 of the *Companies Act*, 1862, and it was in the course of that examination that he produced the above letters. He admitted that he knew *Murray Smith* was agent for *Fisher*, the vendor, and also knew *Murray Smith* was the promoter of the company. There was no evidence whatever that *Archer* had in any way disclosed to his co-directors or any one else the existence of *Murray Smith's* undertaking with him, and in the course of his examination he made no intimation that he had ever disclosed it to any one; the liquidators having no knowledge of its existence until the witness produced the letters.

The summons was heard before Mr. Justice *Kekewich* on the 8th of July, 1891.

Warmington, Q.C., and *C. E. E. Jenkins*, for the liquidators:—

This is simply a case of bribing a man to become a director by undertaking to insure him against any loss. It is impossible, having regard to the principles upon which sect. 165 of the *Companies Act*, 1862—now replaced by sect. 10 of the *Companies (Winding-up) Act*, 1890—has been construed by the Court, that a director can be allowed to escape liability by such a transaction: *Hay's Case* (1); *Pearson's Case* (2); *Nant-y-glo and Blaina Ironworks Company* v. *Grave* (3); *In re Carriage Co-operative Supply Association* (4); *Eden* v. *Ridsdale's Railway Lamp and Lighting Company* (5). The very object of requiring a qualification is that the director shall have a substantial interest in the company, and so afford a guarantee to the outside public that he will do his duty. That object will be defeated if he is to be permitted to effect a kind of insurance against any liability in respect of his qualification, so that he may have substantially no interest in the success of the concern at all.

Renshaw, Q.C., and *Butcher*, for the Respondent *Archer*:—

In order that the liquidators should succeed on this application, they must shew that the company has suffered loss by reason of the act complained of: *In re Coventry and Dixon's Case* (6). This they have entirely failed to do.

[KEKEWICH, J., said that in a recent case of *In re Liverpool Household Stores Association* (7), he had held, following *Bentinck* v. *Fenn* (8), that damage suffered by the company, and traceable to the act complained of, was a condition precedent to the operation of sect. 165 of the *Companies Act*, 1862.]

That action is, for the present purpose, identical with sect. 10 of the *Companies (Winding-up) Act*, 1890, by which it has been superseded.

The £500 was paid by Mr. *Archer* out of his own money. In

(1) Law Rep. 10 Ch. 593.
(2) 4 Ch. D. 222.
(3) 12 Ch. D. 738.
(4) 27 Ch. D. 322.
(5) 23 Q. B. D. 368.
(6) 14 Ch. D. 660.
(7) 62 L. T. (N.S.) 873, 876.
(8) 12 App. Cas. 652.

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the cases cited the qualification was found by the promoters out of money which was really the money of the company.

Secondly, in order that the case may be brought within the section, the act complained of must have been the act of a person who, at the time when it was committed, was an officer of the company. Here the agreement, embodied in the letter of the 13th of May, 1887, was entered into before the company was in existence, and the £500 was paid by Mr. *Smith* to Mr. *Archer* after Mr. *Archer* had ceased to be a director: *McKay's Case* (1).

Warmington, in reply:—

The cases cited apply only to the first branch of sect. 165; this application is based on the second branch of the section, which is altogether different. The misfeasance here complained of is the improper gain which has been made by the person who stood in a fiduciary relation to the company: *Metropolitan Bank* v. *Heiron* (2). But for the agreement which was entered into Mr. *Archer* would never have taken the shares or become a director. Under that agreement he received, not the value of his shares, but a price, by virtue of the agreement, which was independent of that value. That was a clear gain to him. The effect of the agreement was to place him in an improper relation towards the promoter, and to prevent him from taking his proper part as director in the management of the company's affairs: *Derry* v. *Peek* (3). If a man receives a bribe to induce him to become a director, the company, though they may have sustained no loss, but rather been benefited by his services, can, on ascertaining the fact, call him to account: *De Ruvigne's Case* (4), which has not been overruled by *Coventry and Dixon's Case* (5). It is no objection that the company will be paid twice over. That occurs in all cases of this kind.

KEKEWICH, J.:—

It is admitted that this application, if granted, would carry the operation of sect. 165 of the *Companies Act*, 1862, to which,

(1) 2 Ch. D. 1, 6.
(2) 5 Ex. D. 319.
(3) 14 App. Cas. 337: see observations of Lord *Bramwell*, at p. 345.
(4) 5 Ch. D. 306.
(5) 14 Ch. D. 660.

as counsel have done, I refer, rather than to the existing substituted section of the *Companies (Winding-up) Act*, 1890, further, or at any rate a little further, than it has hitherto been carried. There is no case covering the present case, otherwise than in point of principle, according to the construction of the section which the Applicants contend for; and if the present case could be brought within the principle of the Act of Parliament I should certainly not be loth to carry that principle further so as to apply it to a new case which fell within it. But to my mind this case does not fall within the principles laid down in the preceding cases, nor within the language of the Act.

It is attempted to make Mr. *Archer* liable for a misfeasance or breach of trust in relation to this company, of which he was a director. I need not pause to inquire what the distinction is between misfeasance and breach of trust, nor is it I think material to consider whether what is alleged against Mr. *Archer* is a misfeasance or a breach of trust. It matters not which of the two it is alleged to be. The question which must be ascertained before proceeding further is, What is that of which he has been guilty? That he paid full value for the fifty shares in question out of his own moneys—that is to say, out of moneys which were not found for him by any one—promoter, vendor, or other like person—is common ground. That these shares were really his qualification, and that he acted as director qualified by these shares, is also common ground. But what he did was this. Before actually taking the shares, he made an arrangement with Mr. *R. Murray Smith*, who seems to me undoubtedly to have been the promoter of the company, that in the event, which Mr. *Archer* himself regarded as not improbable under the circumstances to which he referred, of his desiring to retire from the company contemporaneously with his desiring to leave this country, Mr. *Smith* would pay to him the value of the shares, or rather the sum which he paid for them, and take over the shares. The alleged misfeasance or breach of trust within the meaning of the Act consists of what he did, not in the receiving the money, as he subsequently did in pursuance of the agreement, but in entering into the agreement. If the view taken by the liquidators is right, from that time forward he was liable for misfeasance under

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the section. He would have been equally liable if he had not transferred the shares, and had never insisted on the indemnity, and never received one penny from Mr. *Smith*. The wrongful act was his entering into the agreement with the promoter of the company. The liquidators' case must stand or fall by that agreement. That he did afterwards transfer the shares, and that he did afterwards insist on the indemnity, and receive back from Mr. *Smith* the £500 which he had paid for the shares, are mere incidents in the case, which may be useful in fixing the amount of the liability, if he is liable at all, but cannot influence the decision upon the question whether he is liable or not. What was there wrong in the transaction? It is not for me to consider whether it was a transaction which the nicer sentiments of honour would sanction. It may or may not be one of those transactions which a gentleman of high honour would engage in. I cannot go into that. It is not my duty to do so. The question is whether there was any misfeasance or breach of trust in relation to the company. The suggestion is that he thereby put himself in the power of the promoter; that he was necessarily more under the influence of the promoter than he would have been if he had taken the shares in the ordinary way without any such indemnity, so that the promoter, who had no proper right to influence the transactions of the company, did obtain an undue influence over them, and that for this Mr. *Archer* is responsible. That is a mere suggestion. There is no trace of any such influence having been exercised, nor any suggestion of any act by Mr. *Archer* improperly done, or done in such a way as to shew that such an influence was exerted. But still, if it was a wrong act, then I apprehend he would be liable for it, notwithstanding that the apprehended consequence did not result. If he did what was wrong, then I should hold that he was liable, though as a matter of fact none of these consequences ensued.

But, then, I have to consider this question. Does the Act of Parliament intend that a director or other officer of the company doing that which is wrong, in the sense that it may possibly lead to bad results, is liable to the company, notwithstanding that such results do not ensue? In other words, can the liquidator, or other person entitled to sue, complain of the conduct of the

director when that conduct has not produced any loss to the company or to the person so suing? That is a question arising on the construction of the Act of Parliament. I must first observe, as I have already had occasion to observe in the case of *In re Liverpool Household Stores Association* (1) to which I referred during the argument, but to which I desire to refer as little as possible, that it has been laid down and is a clearly accepted doctrine that the section creates no new liability. There is a new remedy put by the terms of the section in the hands of persons who could not have sued but for the section. It is laid down in many cases, and in that which we all regard as the leading text-book on the subject, that there is no new liability created by the section. No doubt the section points at criminality, and criminal cases fall within it. No doubt the section also points at acts giving rise to a civil action as distinguished from criminal proceedings. But it does not create a new offence; and it seems to me that if I were to hold that a man might be punished and fined because he has gained, although the company has not lost anything, I should be introducing a new liability, creating a new offence, and applying what is in some respects a new remedy in order to bring that new offence to justice. That seems to me a reason why I ought to look carefully at the section before I apply it to such a case as this.

Then the concluding words of the section point to compensation to the company. The loss suffered by the company is the thing to be compensated for; and that matter received my best consideration in the case of *In re Liverpool Household Stores Association*, where I had to deal with many matters arising under this section, and there, intending to follow *Bentinck* v. *Fenn* (2) and other cases, I held that the section had no application unless it could be proved that the company had suffered damage. Mr. *Warmington* endeavours to get out of that decision—I do not say my decision, but the decision of the House of Lords—and particularly what Lord *Herschell* said in that case, upon the ground that here there was an improper gain, and he is entitled to sue in respect of that gain to the director. It may be that if it could have been established that there was an improper gain in such

(1) 62 L. T. (N.S.) 873. (2) 12 App. Cas. 652.

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a sense that the gain in the hands of the director was his as trustee for the company, that doctrine might have been got rid of, and the case might have been brought within the principle instead of going outside and beyond it. There are many cases in which, where an agent makes a gain for himself, the Court has held him accountable for that gain to his principal. But I fail to see how the agent has gained anything here, more than this, that he has sold the shares for the sum which he had paid for them. He is no better off than he was before, and the company has really lost nothing. If there had been a transaction of this kind—if the promoter had said, "I will give you so many pounds, or such an article or chattel, if you will take these shares," it might have been—I do not say it would have been—that the director as agent could not hold that which he received except for the benefit of the principal, because the gain of the agent was in the eye of the law not the gain of the agent but of the principal, and, therefore, recoverable in that sense. But I fail to see how the acceptance of this indemnity was in that sense a gain which could be recoverable as the gain of the company. No doubt the case is one of some difficulty, and, as I have said, it is admitted to be an attempt to extend a wholesome doctrine —a doctrine which has been used with beneficial effect; but still I do not think that I ought to extend this section to a case which does not seem to me to fall within its principle, especially when I am supported by other decisions besides my own, to the effect that it is necessary to prove loss or damage before the company can recover under the section. For these reasons, although, as I have said, I recognise the case as one of some difficulty, I must hold that this application fails, and must be dismissed.

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From that decision the liquidators appealed. The appeal was heard on the 25th and 26th of November, 1891.

Warmington, Q.C., and *C. E. E. Jenkins*, for the appeal:—

We allege misfeasance or breach of trust within the meaning of sect. 10 of the *Companies* (*Winding-up*) *Act*, 1890, a section which is practically the same as sect. 165 of the *Companies Act*,

1862. The Respondent *Archer* says that the company sustained no damage from his accepting these shares; but it is not a case depending upon damage: we put it upon the principle that a benefit which an agent receives from a third party, in consequence of his position as agent, belongs to his principal: *McKay's Case* (1); *Hay's Case* (2). Here *Archer* received an indemnity in order to induce him to become a director, and, upon the shares held by him as director becoming worthless, he received back under the indemnity the sum which he had paid for them. This was a profit made by him out of his position of director, and he must account for it to the company.

[They were stopped by the Court].

Renshaw, Q.C., and *Butcher*, for the Respondent *Archer*:—

This is an entirely new case. Upon general principles there is nothing intrinsically wrong in a person who has an interest in a company getting that interest represented on the board of directors by putting in his nominee and qualifying him for that purpose. Here, *Murray Smith*, the promoter, did not get a penny of the assets of the company into his own pocket. All he intended to do was to protect *Archer* from loss, and no further. To succeed on an application under sect. 165, or the similar section now substituted for it, the liquidator must bring the case within the very words of the section; but this case is not within the words. If we are hit at all, it must be under the words "misfeasance or breach of trust"; the only way in which the case can be put against us is that the money is recoverable from *Archer* by reason of his fiduciary relation as director; but then it must be shewn either that the agreement was made with the object of improperly influencing him, or that he got some advantage by means of it which resulted in direct loss to the company. Now, it is not suggested in the affidavits filed on behalf of the liquidators that the object of *Murray Smith's* undertaking was to improperly influence *Archer*, or that *Murray Smith* entered into the agreement as agent for the vendor; nor is there any evidence to shew that he was otherwise than an honest promoter. Again, the company suffered no loss on the shares, for they got all

(1) 2 Ch. D. 1. (2) Law Rep. 10 Ch. 593, 601.

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that they could claim upon them, £500. *Archer* did not derive a penny of profit from the transaction. Loss to the company must be proved: *Bentinck* v. *Fenn* (1); *Coventry and Dixon's Case* (2). The cases in which a director has been held liable under sect. 165 may be classed under two heads: first, cases in which a director has made a secret profit out of the property of the company, and has rendered himself liable on the ground of breach of trust; and, secondly, cases in which a director has made a secret profit by taking a bribe from a promoter, in which case there arises an immediate obligation on the part of the director, as agent for the company, to pay the money to his principal as a debt. The present case falls under neither of those heads. No money which was *de facto* money of the company, in the sense of having been in the coffers of the company, ever got into the hands of *Archer*. In every reported case under sect. 165 the director has received some pecuniary advantage by receiving money or money's worth, and so caused a loss to the company, as in *Hay's Case* (3), explained in *Lister & Co.* v. *Stubbs* (4): *Pearson's Case* (5); *Weston's Case* (6); *McKay's Case* (7); *De Ruvigné's Case* (8); *Metropolitan Bank* v. *Heiron* (9).

[FRY, L.J.:—Sect. 10 of the new Act provides for the case of a director retaining not only "any moneys," but also any "property" of the company. Why should not *Archer* be accountable for the £500 as "property" of the company retained by him?]

The real question is, Did the company suffer loss by what was done? They never had the £500, and therefore cannot be said to have lost it. In the majority of cases in which a director has been held accountable to the company he has, in effect, received money which originally came from the coffers of the company, as in *Hay's Case*, and the other cases already mentioned.

[BOWEN, L.J.:—*Smith* being in a fiduciary relation to the company, he had no right to give a director a benefit without

(1) 12 App. Cas. 652.
(2) 14 Ch. D. 660.
(3) Law Rep. 10 Ch. 593, 599.
(4) 45 Ch. D. 1, 13.
(5) 5 Ch. D. 336, 340.
(6) 10 Ch. D. 579.
(7) 2 Ch. D. 1.
(8) 5 Ch. D. 306.
(9) 5 Ex. D. 319, 325.

the company knowing it. An indemnity against loss is a valuable consideration.]

At the time the letter was written *Archer* had not taken the shares, and had not then agreed to become a director. Again, there is no evidence that the contract was not disclosed to the company.

[LINDLEY, L.J.:—There is no evidence that it was disclosed. Ought we not to draw the inference that it was not disclosed?]

It is for the liquidator to prove his case, and if he comes for relief on the ground of non-disclosure by the director, he must prove non-disclosure clearly by his evidence: *Bentinck* v. *Fenn* (1).

[FRY, L.J.:—Would an honourable man assent, as *Archer* did, to accepting this indemnity on the terms that he was to keep it secret? If it was not actually dishonest, it seems to me to have been a very improper course of proceeding.

BOWEN, L.J.:—Is it right that the wolf should give a sop to the watchdog without his master's leave?]

We are not concerned to argue the question as one of nice morality; but we do say that, upon the evidence, there is not a suggestion of dishonesty, and the only other point in the case, that *Archer* derived personal advantage through the receipt of money or money's worth, is not supported by the facts. Even if it is held that *Archer* is accountable for the £500, it would be hard to make him pay interest on that sum.

LINDLEY, L.J.:—

This is an appeal from an order of Mr. Justice *Kekewich*, deciding, in substance, that a gentleman of the name of *Archer* ought not to be ordered to pay to the company a sum of £500 in respect of money which he is alleged to have received, and to be accountable to the company for, under the 10th section of the *Companies (Winding-up) Act*, 1890. It is as follows: "Where in the course of the winding-up of a company under the *Companies Acts* it appears that any person who has taken part in the formation or promotion of the company, or any past or

(1) 12 App. Cas. 652.

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present director, manager, liquidator, or other officer of the company, has misapplied or retained or become liable or accountable for any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the Official Receiver, or of the liquidator of the company, or of any creditor or contributory of the company, examine into the conduct of such promoter, director, manager, liquidator, or other officer of the company, and compel him to repay any moneys or restore any property so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the Court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust, as the Court thinks just." That section is substituted for a similar section, the 165th, in the *Companies Act*, 1862.

Now, it has been settled by various decisions, and particularly by the case in the House of Lords of *Bentinck* v. *Fenn* (1), that the 165th section does not impose new liabilities; it only provides a summary method of doing, by an order in the winding-up, that which might be done by means of an action at law or a suit in Chancery. But it has never yet been decided that, when you are dealing with a director of a company, if you find that he is accountable to the company in such a way that he could be compelled either by action at Law or by suit in Equity to hand over all that the company claims from him, you cannot get it by this summary method. The object of the section is to substitute a summary procedure for a more lengthy one.

With those observations I will proceed to consider who Mr. *Archer* was, and what the facts in this case are, so far as they are admitted; for really, as to the facts, there is very little in controversy. The company itself appears to have been formed in 1887, and one of its objects, as disclosed in the memorandum of association, was to purchase some property in *Australia* which belonged to a gentleman of the name of *Fisher*. One of the articles declared that the directors should be qualified by each holding fifty fully paid-up shares. Mr. *Fisher* had a friend of

(1) 12 App. Cas. 652, 669.

the name of *Murray Smith*. What position Mr. *Murray Smith* was in towards Mr. *Fisher* we do not know; but Mr. *Archer* knew that Mr. *Murray Smith* was, in fact, the agent of Mr. *Fisher*. Mr. *Archer* tells us that in his own deposition on cross-examination. He also knew, from a letter written by Mr. *Murray Smith* to himself, and dated the 3rd of May, 1887, that Mr. *Murray Smith* was a promoter of this company. He knew the facts. Mr. *Murray Smith*, knowing Mr. *Archer*, requested him to become a director. Mr. *Archer* apparently had no particular desire to become a director, but he agreed to become a director upon certain terms, which were that Mr. *Murray Smith* should, in fact, relieve him of his shares if he desired to part with them, and relieve him at par. The letter which contains this arrangement is dated the 13th of May, 1887; it is from Mr. *Murray Smith* to Mr. *Archer*, and runs thus: "Dear Sir,—Should you desire at any time to part with the fifty shares in the *North Australian Territory Company* which you are about to take, I undertake to purchase them from you at the same price which you pay for them." That letter was accompanied by another written by Mr. *Murray Smith* to Mr. *Archer*, and which other letter requests Mr. *Archer* to say nothing about this. Mr. *Archer* becomes a director; he qualifies himself; he takes fifty shares; he pays for them in full out of his own pocket; he acts as director for some time, rather more than a year, when, as he is about to go abroad, he resigns, and desires to get rid of his shares, which, as the evidence shews, were not then worth a farthing. He thereupon requests Mr. *Murray Smith* to act upon the letter I have read, and to take the shares off his hands at par. Mr. *Murray Smith* does so, pays him the £500, and so completes his part of the bargain.

Those are the facts which are beyond all controversy. I will now allude to one or two as to which I do not say there is a controversy, but as to which there is a suggestion of controversy. It is suggested that there is no evidence, on which the Court ought to act, that Mr. *Archer* did not disclose this agreement to his co-directors. It is pointed out that the House of Lords has said it is incumbent on the liquidator to make out his case. So it is, of course; but having regard to the

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indisputable fact that Mr. *Archer* was requested to keep the matter quiet, having regard to the fact that there is not a trace to be found in the company's books or anywhere else of any intimation to anybody that the agreement existed, having regard to the fact that Mr. *Archer* when he was cross-examined never suggested that he told anybody about it, and having regard to the fact that the liquidators first heard of the agreement in the course of Mr. *Archer's* cross-examination, the inference I draw as matter of fact is that it is proved that this was not disclosed at all. It is obvious that it was not.

Now, that being so, the question arises whether this £500 can be regarded as payable by Mr. *Archer* to the company? Can the company claim it upon any recognised principle of Law or of Equity? My answer is, Unquestionably the company can; and the principle upon which I rely in support of that opinion cannot be better stated than it was by Lord Justice *Mellish* in *Hay's Case* (1). He says (2): "There is no doubt about the rule of this Court, that an agent cannot, without the knowledge and consent of his principal, be allowed to make any profit out of the matter of his agency beyond his proper remuneration as agent. It is perfectly settled law that that rule applies with peculiar stringency to the directors of joint-stock companies who are the agents of the company for effecting the sales or the purchases made by the company." Then the Lord Justice goes on to say that the only question in that case was whether Sir *John Hay* came within that principle. Now, Mr. *Renshaw* and Mr. *Butcher* have argued that that principle is not applicable to this case; and they put it in this way, and very forcibly: they say that this is a new case—and I think it is, as regards details. They say that there was nothing got from the company by Mr. *Murray Smith*, or by Mr. *Archer* through Mr. *Murray Smith*. I do not know whether that was the case or not: I am not going to speculate whether it was; but Mr. *Murray Smith* unquestionably was a promoter acting in the interests of the vendor: there is no question whatever about that. But even supposing that Mr. *Murray Smith* got nothing directly or indirectly out of this company, can it be right, considering the

(1) Law Rep. 10 Ch. 593. (2) Law Rep. 10 Ch. 601.

position of a promoter and the position of a director, for a promoter to put a director in the position in which Mr. *Murray Smith* put Mr. *Archer*? What is the object of having a stipulation in the articles that a director shall hold qualification shares? It is, of course, to give him a personal interest in the affairs of the company, and to induce him to attend to them in a way very different to what he would do if he had no interest in them at all; and if there is a board of directors, some of whom have acquired that interest which they are intended to have, and some of whom have not because they have bargained to be indemnified against all possible loss, can it be said that a bargain like that is one which is justifiable between a promoter and a director, and one which does not bring the director within sect. 165, if he receives anything by virtue of that bargain? It seems to me that such a bargain as that in the present case is entirely fraudulent--fraudulent, I mean, in this sense, that it was putting Mr. *Archer* in a position in which, as a director, he was never intended to be put by the articles or by the constitution of this company.

It is said, further, that there was no loss to the company. Now, that is quite true if you look at the matter from one point of view; but it is not true if you look at it from another. It is quite true that the company, having received £500 in respect of these shares, have not lost anything by issuing those shares to Mr. *Archer*. That is perfectly true; but when it is said that there is no loss to the company, that is really begging the question. If this money which Mr. *Archer* got from Mr. *Murray Smith* ought to be accounted for to the company, the company loses if they do not get it.

Then it is said that there is no profit to Mr. *Archer*. That, again, depends upon the point of view from which you regard the matter. If you look at his position at the beginning of the transaction, he has made no profit out of it. He paid £500 for his shares, and has got £500 back; but if you look at his position at the time he got the £500, he made a very large profit. The shares were his; the shares were not worth £500; the shares were not, in fact, worth a farthing, and he got £500 for them. If he is accountable to the company in respect of that

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sum, what is his retention of it but a loss caused to the company, which they seek to avoid by making him liable?

Then it was said there is no dishonesty in the case. I do not pursue that point further; I have said quite enough about it in my observations respecting the arrangement in general, which is not creditable, to say the least of it.

Now, that being the case, why does it not come within the principle to which I have alluded, and which is explained in the passage I have read from the judgment of Lord Justice *Mellish*? Has not Mr. *Archer* obtained, in respect of his agency, a sum of money which, upon the principle which I have endeavoured to explain, is payable by him to the company. To say it is the company's money is to use an ambiguous expression. In one sense it may be said to be the company's money—that is to say, in the sense that the company are entitled to get it. In another sense it is not the company's money—that is to say, the company cannot follow it into investments of it, nor, in the event of Mr. *Archer's* bankruptcy, could they withdraw the money from his assets instead of ranking as creditors against his estate. The difference is explained in *Lister & Co.* v. *Stubbs* (1). Then it is said that the 165th section has been expounded in *Coventry and Dixon's Case* (2) and *Bentinck* v. *Fenn* (3) in such a way as not to entitle the liquidators to recover this money, at all events in this form. Upon that point I will turn to what Lord *Herschell* said in *Bentinck* v. *Fenn* and shew why that case failed in the House of Lords. It was an application under the 165th section against a vendor of a company, who was also one of its directors, to compel him to pay to the company certain moneys which he was alleged to have got from the company in excess of the value of the land. The view taken by the House of Lords upon the facts, of course, I do not discuss. I take the facts as they find them. It was held that the application must be dismissed on two grounds—namely, that the evidence adduced by the applicant failed to shew that the director had not disclosed his interest, and also that the evidence failed to shew that the purchase price was above the value. Now,

(1) 45 Ch. D. 1. (2) 14 Ch. D. 660.
(3) 12 App. Cas. 652.

taking the facts in that case as established, it follows that the director there, Mr. *Fenn*, had not received any money at all which could be claimed; and, of course, if you once arrive at that, then the observations made by Lord *Herschell* become perfectly intelligible. The present case proceeds upon the ground that Mr. *Archer* has, in fact, received money to which the company is entitled, and the observation, therefore, that there has been no loss by the company, or that the liquidator, creditor, or contributory cannot take out a summons under sect. 165 unless he shews that the breach of duty has resulted in loss to the assets of the company, and that he has a direct pecuniary interest in the success of the application, is inapplicable to this case. In *Bentinck* v. *Fenn* (1) the decision of the House of Lords was based upon this, that an applicant under the 165th section was bound to prove, not merely a breach of duty on the part of a director, but also that the breach of duty had resulted in loss to the company. If there is no loss, of course, there is nothing to recover, and the decision of the House of Lords in that case shewed there was nothing to recover. Why? Because Mr. *Fenn*, not having received, ought not to be called upon to pay, anything. But if you once arrive at the conclusion that the person proceeded against has received money to which the company is entitled and does not pay it over, the observations of Lord *Herschell* have no real bearing on the present case. It seems to me, therefore, that this case is within the principle laid down in *Hay's Case* (2) to which I have alluded. Although, in one sense, the company have not lost money, yet in another sense they have been kept out of that which they have a right to receive; and although, in one sense, Mr. *Archer* has not made any profit out of this transaction, yet in another and a very real sense he has, and that profit belongs to the company and not himself.

I think the learned Judge has failed to arrive at the right decision in this case, and that Mr *Archer* ought to be ordered to repay the £500.

BOWEN, L.J.:—

I am of the same opinion. I add some observations on the

(1) 12 App. Cas. 652. (2) Law Rep. 10 Ch. 593.

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question that has been argued before us out of respect to the learned Judge below from whom we are differing.

Mr. *Archer*, the gentleman whose conduct we are considering, was induced by a promoter of the company, who was acting in the interest of the vendor—induced, that is to say, by a person who stood in a fiduciary relation to the company—to become a director. In order to induce him to become a director, the promoter, Mr. *Murray Smith*, gave him a promise, afterwards fulfilled, to indemnify him against loss in respect of his shares, a director having to qualify himself by taking shares in the company. The shares, when they were bought by Mr. *Archer*, were valuable. In the course of time their value fell to nothing; the indemnity was performed, and Mr. *Archer* emerged from the transaction, not indeed with a profit in one sense, but without loss which otherwise he would have sustained.

Now, what is the true course of reasoning on the subject? As it seems to me it is this: that promise of an indemnity, or that indemnity, as I may call it, was a valuable consideration; it was not money, but it was money's worth, the measure and exact value of which depended upon the future; and events which have since happened shew that the measure and value of that indemnity was £500. The right to the value of that indemnity, whatever might become its value in the future, belonged to the company. The gentleman who was about to become their agent, their director, received it in order to induce him to become a director, and he received it from a person standing in a fiduciary relation to the company. What is the law applicable to this case? It is clear and simple. The company ought to have been told of the existence of the bargain in order that they might elect whether they would let their director keep the advantage or not. If its existence was not disclosed, then, inasmuch as the indemnity became fruitful, the money which arose from it became money for which the director who had kept it secret was bound to account to the company. That seems to me to be the law; and, differing as I do from the learned Judge whose judgment is under consideration, I cannot see that it can be rightly said there was no loss to the company. It is perfectly true that, in one sense, there was no loss; but in another sense there was. The loss was that

the company did not get that benefit from the indemnity which ought to have been theirs, but that somebody else got it. They did not have accounted for to them the value of this indemnity as soon as it became valuable. They ought to have had it accounted for, and the non-accounting for it was, in my opinion, a misfeasance. That conclusion I take to be good in law; but is it not good sense as well as good law? A promoter who is acting in the interest of a vendor is forming a company. The company is formed with articles of association under which a director is to be qualified by holding and paying for fifty shares. What is the object of such a clause? Amongst others, that the company shall have the security of this, that the director has a stake in the concern while he is acting as director, and that he shall not be simply in the position of a person who can, without loss to himself, play ducks and drakes with the company's property. It is so far a shield to the company. Yet the promoter who is promoting the company indemnifies the director against any loss on those shares; that is to say, he destroys by such an agreement an important element which guarantees the company for the vigilance of their director. The director of a company is placed upon the board in order that he may, among other duties, as it appears to me, watch the proceedings of the promoter who is acting as agent for the vendor. Is it lawful, is it tolerable, either in Equity or in law, that a promoter should be at liberty to have a director in his pay? Certainly not. But he is really having the director in his pay if he is guaranteeing the director against loss in respect of shares which the director is bound to hold in order to qualify himself under the articles. As I said during the argument, the director is really a watch-dog, and the watch-dog has no right, without the knowledge of his master, to take a sop from a possible wolf.

The case seems to me to be clear; but the point was taken by Mr. *Butcher*, with his usual ingenuity, that there was no evidence here of non-disclosure to the directors of the receipt of this promise of indemnity. That is a point which would have deserved attention if the case were being tried in the first instance, because the *onus* of proving misfeasance rests with those who desire to prove it. But in this case we have the facts illuminated by the

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light of the letters which have passed between Mr. *Archer* and Mr. *Murray Smith*. In giving the promise of indemnity, Mr. *Murray Smith* did so upon the terms that there should be no disclosure of what had been done. Mr. *Archer*, who took the indemnity on those terms, must, as an honest man, be taken to have carried them out. He does not repudiate the terms of Mr. *Smith*; he accepts the indemnity and acts upon it. There is not a trace in the correspondence of any disclosure to the Board; and when Mr. *Archer* goes into the box and is examined, he does not suggest to his counsel, nor does his counsel suggest to him, that there ever was a disclosure of this indemnity—a transaction which, it was agreed in the first instance, should be buried in silence. It would be puerile, in my opinion, to allow a case clear in law against Mr. *Archer* to be defeated upon the ground that there is here no evidence of non-disclosure. Having regard to the conduct of the case at the trial and to the correspondence, there is evidence of non-disclosure enough to justify any Court in feeling perfectly safe in acting upon it. I, at all events, have no hesitation in deciding that point against Mr. *Archer*, and I think, for the reasons that have been given by my learned Brother, that the case of *Bentinck* v. *Fenn* (1) has no application. I, therefore, agree that the appeal must be allowed.

FRY, L.J.:—

I am entirely of the same opinion. The point which has been much pressed upon us is the want of any evidence of loss by the company as the result of this transaction. Now, on principle, I do not think that that point can be maintained, and I can add nothing useful to what has been said by my learned Brethren. But this observation I will make, that the argument appears to me to be inconsistent with two cases. In *Hay's Case* (2) the company agreed to pay a sum of money to the vendors of the property. On one day they were paying a sum of £58,000 in part-payment of that purchase-money; cheques were drawn in favour of the agent of the vendors, and one of those cheques was indorsed over to Sir *John Hay* and cashed by him. The company, therefore, were making a payment which they were bound

(1) 12 App. Cas. 652. (2) Law Rep. 10 Ch. 593.

to make, and they lost nothing, in one sense, by Sir *John Hay* receiving that money. The only loss they sustained was by Sir *John Hay* not accounting for it when he got it. It appears to me there was, therefore, exactly the same loss in that case as there is in the present case. Again, in *Pearson's Case* (1), the same observation can be made. The company there issued to its promoters, under an agreement, fully paid-up shares. Some of these shares were given by one of the promoters to Sir *Edwin Pearson*, one of the directors, as his qualification. The company, therefore, got all they stipulated for, all the shares that they issued and which were in Sir *Edwin Pearson's* hands having been by agreement issued as fully paid up, and yet, because he ought not to have taken those fully paid-up shares, but ought to have paid the amount which was not payable by reason of the bargain between the company and the promoters, he was held liable to make good and treat the shares as if they had not been paid up at all. It might be said in both those cases (in *Hay's Case* (2) the payment was by the vendors, and in *Pearson's Case* the payment was by a promoter) that the company lost nothing by the money in the one case, and the shares in the other, reaching the hands of the director; but the Court said in each case that, because the director was accountable, the company were losers to that extent. Those decisions appear to me entirely to apply to the present case. It is quite true that in this case the company lost nothing, in this sense, that they received £500 for the shares; but they have not received the £500 which Mr. *Archer* has received by virtue of the indemnity which he obtained from the promoter. On principle, I think the two cases to which I have referred are not distinguishable from the present.

With regard to the question that there is a want of evidence in the present case of the non-disclosure of this bargain to the company, I am bound to say that, to my mind, the *res ipsa* almost convinces one that there was no disclosure. An agreement of this sort, from its very nature, is intended not to be disclosed. It is not one of those honest and straightforward transactions which men who value their character, or men of business, might desire to be disclosed; but, if further evidence

(1) 5 Ch. D. 336. (2) Law Rep. 10 Ch. 593.

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ARCHER'S CASE.
Fry, L.J.

be wanted, I think it is abundantly found in the second letter to which reference has been made; and I think we should be closing our eyes to what are obviously the real facts of the case, and should be acting, not as reasonable men, but as men who were neglecting to take cognizance of the ordinary course of human affairs and of the ordinary motives by which mankind is actuated, if we did not conclude from the facts before us, as an inference of fact, that there was no disclosure of this bargain at all to the company. That appears to me to be the true inference from the facts before us.

With regard to the general law and the other facts of the case, I have nothing to add. I can only express my entire concurrence in everything that has been said by my two learned Brethren.

LINDLEY, L.J.:—

The appeal is allowed, with costs, both here and below. As regards interest, we think it is right to give interest from the date of the summons at 5 per cent.

Solicitors: *Saunders, Hawksford, Bennett & Co.*; *Mackrell, Maton, & Godlee.*

G. I. F. C.

C. A.
1891
Dec. 7.

In re WARE (A PERSON OF UNSOUND MIND).

Lunacy—Sale of Lunatic's Real Estate—Consideration—Perpetual Rent-charge —Lunacy Act, 1890 (53 *Vict. c.* 5), *ss.* 117, 120.

Under sects. 117 and 120 of the *Lunacy Act*, 1890, the Court has power to sanction a sale of a lunatic's real estate in consideration of a perpetual rent-charge, and will exercise such power if the evidence shews that such a sale will be for the benefit of the lunatic.

R. S. H. WARE, a person of unsound mind not so found by inquisition, was entitled to one thirty-sixth share of certain freehold property at *Manchester*. The owners of the remaining thirty-five thirty-sixth shares had entered into a provisional contract for the sale of the property to the *Equitable Fire and Accident Office, Limited*, in consideration of perpetual yearly rent-

charges, to be paid by the purchaser, his heirs and assigns, and to be divisible among the vendors according to their respective interests therein. The rent-charges were to be secured by covenants and powers of re-entry. The company also agreed to expend £25,000 in rebuilding, and to secure this expenditure by making deposits to the value of £7000. It was a term of the contract that the sanction of the Court should be obtained to it so far as it related to the share and interest of *R. S. H. Ware*. *R. S. H. Ware* was a "person lawfully detained as a lunatic though not so found by inquisition" within the terms of sect. 116 of the *Lunacy Act*, 1890. His property was subject to a mortgage, and he was at present in the county lunatic asylum at *Lancaster* as a pauper, under the authority of the *Holborn Union* and a Continuation Reception Order. This was an application, under sect. 116 of the Act of 1890, by his brother and presumptive heir-at-law, asking that the Rev. *H. M. Oswald* might be appointed to exercise the powers of a committee of the estate of *R. S. H. Ware*, and might be authorized to concur on his behalf in the sale.

It appeared that sales in consideration of rent-charges were of common occurrence in *Manchester*, that the sale was a beneficial one, and that, if it was carried out, the income of the lunatic's property would be increased from £64 11*s.* 5*d.* to £72 4*s.* 5*d.*

The *Lunacy Act*, 1890, provides in sect. 117 as follows:—

"(1.) The Judge may order that any property of the lunatic, whether present or future, be sold, charged, mortgaged, dealt with, or disposed of as the Judge thinks most expedient for the purpose of raising or securing, or repaying with or without interest, money which is to be or which has been applied to all or any of the purposes following:—(*a*) Payment of the lunatic's debts or engagements; (*b*) discharge of any incumbrance on his property; (*c*) payment of any debt or expenditure incurred for the lunatic's maintenance or otherwise for his benefit; (*d*) payment of or provision for the expenses of his future maintenance."

And by sect. 120: "The Judge may, by order, authorize and direct the committee of the estate of a lunatic to do all or any

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of the following things" (*inter alia*) "(*a*) Sell any property belonging to the lunatic."

E. P. Hewitt, in support of the application:—

Under sect. 120 the Judge has power to authorize and direct the committee to sell any property belonging to the lunatic; and, under sect. 117, the Judge may order any property of the lunatic to be sold or disposed of as he thinks most expedient for certain purposes therein mentioned, amongst which are payment of or provision for the maintenance of the lunatic. The words of both sections are wide and general, and there is nothing to limit the mode in which the sale is to be carried out. The evidence shews that this is a beneficial sale. I submit that the Court has power to sanction it although it is not for a price to be paid down at once, but a perpetual rent-charge.

LINDLEY, L.J.:—

The question raised in this lunacy is one of considerable importance. The lunatic is entitled to one thirty-sixth of some real estate, and his co-owners have entered into a contract for sale in consideration of a perpetual rent-charge. The question is whether the Court can authorize a sale in consideration of a rent-charge. Considering the objects for which the 120th section of the Act was enacted, it appears to me that we shall not be stretching the language of the section, but, on the contrary, shall be giving it the effect which it was intended to have, if we decline to put a narrow construction upon the section. The section says that the Judge may authorize and direct the committee of the estate of a lunatic to do all or any of a number of things, the first of which is to "sell any property belonging to the lunatic." In determining what a Judge ought to do in exercising the power conferred by the section, the first thing to consider is what is for the benefit of the lunatic, and if it is for his benefit to sell the property in consideration of a rent-charge, then there is nothing in the section to cut down the power. It is proposed in this case to sell the property in consideration of money secured, and such a disposition is a "sale," although the consideration is not to be paid in cash at once. I will not express

any opinion as to whether this method of sale could be adopted by trustees acting under an ordinary power of sale. But an enactment for the benefit of a lunatic ought to receive a wide rather than restricted construction, and I am prepared to hold that the Court has power to authorize a sale of this character under the 120th section. Any doubt upon the point is, however, removed by sect. 117. That section empowers the Judge to order that any property of the lunatic may be sold or disposed of as the Judge thinks most expedient for the purpose, amongst other things, of paying or providing for the expenses of his future maintenance. This application is one that might be deemed to have been made under the latter section, and, taking these two sections together, there cannot be a doubt that in this case we have power to sanction this sale.

BOWEN, L.J.:—

I am of the same opinion. I adjourned this case into Court as I understood that doubts had been expressed on the subject. Having regard to the obvious scope of the section I think the word "sold" is large enough to include this manner of sale.

FRY, L.J.:—

I concur.

LINDLEY, L.J.:—

The order will include directions to the committee to execute the necessary deeds.

Solicitors: *Aldridge, Thorn, & Morris,* for *Robinson & Freeland, Saffron Walden.*

W. W. K.

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Jan. 19.

In re LEON.

Lunatic—Trustee—Vesting Order—Reduction of Number of Trustees—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *ss.* 135, 136; *Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 32.

Where one of four trustees of a will had been found lunatic by inquisition, the Court made an order vesting his estate in the other three trustees, although the number of trustees was thereby diminished.

PHILIP LEON, by his will dated the 16th of April, 1878, devised and bequeathed all his residuary real and personal estate to *Alice J. Leon*, *Alexander J. Montefiore*, *Henry J. Caburn*, and *Frank P. Leon*, upon certain trusts, for the benefit of the said *Alice J. Leon*, during her life, and after her death for the testator's children. The testator died on the 24th of March, 1879. His estate now remaining subject to the trusts of the will consisted of money invested on mortgage, and of various stocks, bonds, and policies of insurance.

On the 27th of January, 1891, *Frank P. Leon* was found a lunatic by inquisition. No committee had been yet appointed. The three other trustees now presented a petition in the Lunacy praying that the estate in the several mortgaged premises and the right to transfer, sue for, and recover the other investments and sums of money, might be vested in the Petitioners, upon the trusts of the will.

The Master approved of the proposed order. The children beneficially interested were added as co-Petitioners by the direction of Lord Justice *Fry*. The petition was adjourned into Court.

Dundas Gardiner, for the Petitioners, referred to the *Lunacy Act*, 1890, s. 135, sub-s. 1, which is as follows: "Where a lunatic is solely or jointly seised or possessed of any land upon trust or by way, of mortgage the Judge in Lunacy may by order vest such land in such person or persons for such estate, and in such manner, as he directs." And sect. 136, sub-sect. 2, gives equally wide powers to the Judge to make vesting orders of the

right to transfer and call for a transfer, and to sue for sums of stock and *choses in action* of lunatic trustees and mortgagees.

Since the *Conveyancing Act*, 1881, sect. 32, had been passed, there was no objection to diminishing the number of trustees where there were more than two.

[KAY, L.J., referred to *West of England and South Wales District Bank* v. *Murch* (1).]

LINDLEY, L.J.:—

The 135th and 136th sections of the *Lunacy Act*, 1890, are very wide in their terms; and, having regard to the state of the law and the authorities before the Act was passed, I think that we have jurisdiction to make the order asked for, although by so doing the number of trustees will be diminished.

LOPES, and KAY, L.JJ., concurred.

Solicitor: *H. Montagu.*

M. W.

In re NEATH AND BRECON RAILWAY COMPANY.

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NORTH, J.
Jan. 16.
C. A.
Jan. 27.

[1891 N. 1259.]

Railway Company—Scheme of Arrangement—Confirmation by Court—Non-assent of Class of Preference Shareholders—Rights "prejudicially affected"—Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127), *ss.* 6, 10, 12, 15, 16, 17 [*Revised Ed. Statutes, vol. xv., pp.* 599, 600].

Held, by the Court of Appeal (affirming the decision of *North*, J.), that the assent of the statutory majority of a class to a scheme of arrangement under the *Railway Companies Act*, 1867, cannot be dispensed with under sect. 15, if any existing right of that class is prejudicially affected, it being for them and not for the Court to consider whether the scheme gives them such benefits that their rights on the whole are not prejudicially affected.

PETITION by the directors of the company asking for the confirmation by the Court of a scheme of arrangement between the company and their creditors, which had been filed by the

(1) 23 Ch. D. 138.

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directors under the provisions of the *Railway Companies Act*, 1867.

On the 12th of August, 1891, the date of the filing of the scheme, the issued capital of the company consisted of the following particulars:—

	£
First debenture stock	110,600
A debenture stock	275,103
B debenture stock	295,870
C debenture stock	430,650
D debenture stock	104,405
Preference £10 shares	122,800
Ordinary shares	256,230

These stocks and shares had priority in the order in which they are above stated. The A debenture stock bore interest at £4 per cent., the B and C debenture stocks at £3 per cent., and the D debenture stock and the preference shares at £1 10*s.* per cent. The assents required by the Act had all been given to the scheme, except in the case of the preference shares. The preference shares were 12,280 in number. Of them 4225 (more than one-fourth in value) were held by three persons as trustees on behalf of the *London and North Western Railway Company*. The remaining 8055 shares were held by forty-one separate proprietors. Of these, thirty-two, who held altogether 7598 shares, had assented in writing to the scheme, and the other nine, who held together 457 shares, had not expressed their assent. No holder of preference shares had expressed dissent. The trustees of the *London and North Western Railway Company* had had notice of the scheme; but they had not expressed either assent or dissent. The assents represented in value £75,980; but this was less by £16,120 than three-fourths in value of the total amount of the preference shares, and the result was, that the written assent of three-fourths in value of the preference shares, which is required by sect. 12 of the Act, had not been obtained.

The interest on the A debenture stock was cumulative, and at the date of the filing of the scheme there was due to the holders of that stock an arrear of interest amounting to £40,930.

The interest on the B, C, and D debenture stocks was non-cumulative. The scheme provided that the A debenture stock should be increased by £41,000, which was to be applied in capitalizing the arrears of interest. This would increase by £1640 the annual charge of the A debenture stock. But, on the other hand, the A debenture stock was to be divided into two halves, on one of which the interest was to be non-cumulative.

The interest on the B debenture stock was to be raised from 3 per cent. to 4 per cent.; but the amount of the capital was to be reduced, so that the total increase of the interest on that stock would amount to only £8 7*s.* 8*d.* The C debenture stock, which carried interest at the rate of 3 per cent., the D debenture stock, which carried interest at the rate of 1½ per cent., and the preference shares, which carried interest at the rate of 1½ per cent., were to be converted into one consolidated 4 per cent. preference stock, the amounts of capital being reduced respectively to 80, 30, and 20 per cent. This stock was to rank next after the B debenture stock. The ordinary shares were to be converted into ordinary stock of the same nominal amount. It appeared in evidence that the revenue of the company had for years been steadily increasing, and though they had never been able to pay the interest on the A debenture stock in full, the yearly amount applicable to paying it had increased to more than two-thirds of the interest on the increased amount of A debenture stock proposed by the scheme.

In the year 1877 a scheme of arrangement under the Act was filed by the directors, and Vice-Chancellor *Malins*, in March, 1878, upon the petition of the directors, made an order confirming the scheme, although three-fourths in value of the preference shareholders had not assented in writing to the scheme. On that occasion, as on the present, the trustees for the *London and North Western Railway Company* remained neutral; and, as they held more than one-fourth in value of the preference shares, the assent of three-fourths in value could not be obtained. But no preference shareholder expressed dissent from the scheme, or appeared on the hearing of the petition for confirmation. Under those circumstances, the Vice-Chancellor said that he might treat the preference shareholders as assenting to the scheme, and he

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accordingly confirmed the scheme (1). Some of the holders of debenture stock appealed, and the Court of Appeal affirmed the Vice-Chancellor's order. But there was nothing to shew that the attention of the Court was directed to the non-assent of three-fourths in value of the preference shareholders, or that the Court expressed any opinion on this point.

The petition was heard before Mr. Justice *North* on the 16th of January, 1892.

Cozens-Hardy, Q.C., and *Redman*, for the Petitioners:—

No one can be heard in opposition to the scheme without the special leave of the Court, no appearance having been entered, as required by rule 19 of the Order of the 24th of January, 1868, made under the *Railway Companies Act*, 1867; *Browne* and *Theobald's* Law of Railways (2).

Everitt, Q.C., for a holder of A debenture stock, asked for special leave to be heard in opposition to the scheme.

NORTH, J., gave leave.

Cozens-Hardy, Q.C., and *Redman*, for the Petitioners:—

The scheme is a very beneficial one. The only question is, whether the non-assent of the class of preference shareholders in the manner prescribed by sect. 12 (3) of the *Railway Companies*

(1) 1878. March 15.
MALINS, V.C.:—
There is one class only who have not given their assent, the holders of preference shares. As to these it is deposed as follows: "The total amount of the preference shares or stock is £122,800, and is held by thirty-five persons; three-fourths of this stock would be £92,100; but assents have been received from only fifteen persons, holding £50,240, or £41,860 less than is required—three-fourths." Then the same deponent says, in another part of his affidavit, that although they have not got that consent, the interest of the preference stockholders is not in any way affected, and I think that is borne out by the fact that no preference stockholder has appeared to oppose this scheme. Therefore, for the present purpose, I may take them as assenting to it.

(2) 2nd Ed. p. 594.

(3) The *Railway Companies Act*, 1867, enables the directors of a railway company to file a scheme of arrangement with the company's creditors.

By sect. 10: "The scheme shall be deemed to be assented to by the holders of mortgages or bonds issued under the authority of the company's special Acts when it is assented to in writing by three-fourths in value

Act, 1867, prevents the Court from confirming the scheme. The scheme, no doubt, does affect some of the existing rights or interests of the preference shareholders; but, if it is looked at as a whole, it is beneficial to them. Consequently, it cannot be said that the scheme "prejudicially affects" any of their rights or interests; and, therefore, sect. 15 applies, and their assent is not requisite. No preference shareholder now appears to oppose the scheme. Under precisely similar circumstances, Vice-Chancellor *Malins* confirmed the former scheme. His decision was affirmed by the Court of Appeal; but it does not appear that the point as to the non-assent of the preference shareholders was raised in that Court.

The class of A debenture stockholders having assented to the scheme in the manner prescribed by the Act, every member of the class is bound by the assent of the majority, unless it can be

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of the holders of such mortgages or bonds, and shall be deemed to be assented to by the holders of debenture stock of the company when it is assented to in writing by three-fourths in value of the holders of such stock."

Sect. 12: "The scheme shall be deemed to be assented to by the guaranteed or preference shareholders of the company when it is assented to in writing as follows: If there is only one class of guaranteed or preference shareholders, then by three-fourths in value of that class, and if there are more classes of guaranteed or preference shareholders than one, then by three-fourths in value of each such class."

Sect. 13: "The scheme shall be deemed to be assented to by the ordinary shareholders of the company when it is assented to at an extraordinary general meeting of the company specially called for that purpose."

Sect. 15: "Provided that the assent to the scheme of any class of holders of mortgages, bonds, or debenture stock . . . or of any class of guaranteed or preference shareholders . . . shall not be requisite in case the scheme does not prejudicially affect any right or interest of such class. . . ."

Sect. 16: "If at any time within three months after the filing of the scheme, or within such extended time as the Court from time to time thinks fit to allow, the directors of the company consider the scheme to be assented to as by this Act required, they may apply to the Court by petition in a summary way for confirmation of the scheme. . . ."

Sect. 17: "After hearing the directors, and any creditors, shareholders, or other parties whom the Court thinks entitled to be heard on the application, the Court, if satisfied that the scheme has been within three months after the filing of it, or such extended time (if any) as the Court has allowed, assented to as required by this Act, and that no sufficient objection to the scheme has been established, may confirm the scheme."

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shewn that their assent was obtained by fraud: *In re East and West Junction Railway Company* (1).

Everitt, Q.C., for a holder of A debenture stock, opposed the confirmation of the scheme.

NORTH, J.:—

In my opinion, the scheme is a beneficial one, and I should have been prepared to confirm it, but for the difficulty which I feel as regards the class of preference shareholders. This difficulty has not been removed, and, therefore, I cannot confirm the scheme. But I have heard the case throughout, and I express my opinion upon the scheme as a whole, in order that, if the Petitioners should desire to take the opinion of the Court of Appeal upon this one point, they may be able to do so without going into the whole matter again. The objections raised by Mr. *Everitt* are, I think, answered, so far as they are of any weight, by the fact that the class of holders of debenture stock which he represents have met and considered the matter, and have come to the conclusion that it is decidedly for their interest that the proposed scheme should be adopted; and, so far as I am able to form an opinion about it, their view is right. But the difficulty of the Petitioners arises in this way. The class of preference shareholders hold 12,280 shares, and it is admitted that the assents given are less than two-thirds in value of the whole. It is said that of the remainder who have not assented the greater part are neutral (that is the phrase used in the secretary's evidence), and I think there is no reason to doubt that he is strictly correct in saying that the holders of those shares do not choose to interfere.

It is clear that, as three-fourths in value have not assented, sect. 12 of that Act has not been satisfied.

But it is said that, notwithstanding this, I may confirm the scheme, having regard to sect. 15 of the Act. Now, sect. 17 shews what I have to do: "After hearing the directors, and any creditors, shareholders, or other parties whom the Court thinks entitled to be heard on the application, the Court, if satisfied that the

(1) Law Rep. 8 Eq. 87.

scheme has been within three months after the filing of it, or such extended time (if any) as the Court has allowed, assented to as required by this Act, and that no sufficient objection to the scheme has been established, may confirm the scheme." I have, therefore, before I can confirm the scheme, to see that it has been assented to as required by the Act. Now, it is quite clear that sect. 12 has not been complied with; and, if it stood upon sects. 12 and 17 alone, I could not confirm the scheme. But then sect. 15 says that "the assent to the scheme of any class of . . . preference shareholders . . . shall not be requisite in case the scheme does not prejudicially affect any right or interest of such class." Now, is any right or interest of the preference shareholders affected by this scheme? It is not disputed that certain of their rights or interests are affected; but it is said, that, if you take the scheme as a whole, they will be in a better position under it than they were before, and that, therefore, their rights and interests will not be "prejudicially affected" by the scheme. Looking at the scheme as a whole, I think that is so. But I do not read the words of the section as equivalent to "if their rights and interests are not prejudicially affected by the scheme as a whole." That is the question, or one of the questions, which has to be considered by each class—shareholders, debenture-holders, or whatever they may be—in deciding whether they will assent or not. It is a point upon which there may be great differences of opinion, and with respect to which they are competent to judge for themselves; and by the Act the assent of a specified majority is to bind the dissentient minority. The question whether the scheme as a whole is beneficial to them is, in my opinion, the matter which is left to them; and, if they are not to be judges of such a matter, I do not see why it should be left to them to express an opinion about the scheme at all. The argument is that, if the Court should come to the conclusion that, taking the scheme as a whole, any particular class will not be prejudiced, then the assent of that class is not requisite, and the Court may confirm the scheme although that class has not assented. I do not think that is the meaning of sect. 15. I think the meaning is, that, if any of the existing rights or interests of a class is affected by the scheme, that class is to be

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North, J

consulted, and their assent must be obtained; but if the existing rights and interests of any class are not affected in any way whatever, then the Court need not regard that class at all, and need not require any assent from them.

It is said that on the filing of another scheme by this company in 1878, Vice-Chancellor *Malins* confirmed it, and treated the preference shareholders as assenting to it, though, by reason of the non-assent of the trustees for the *London and North Western Railway Company*, the persons whose non-assent is the important feature on the present occasion, the assent in writing of three-fourths in value had not been given. I am unable to accept his view of the Act. It seems to me, for the reasons which I have already given, that it cannot be said that no right or interest of the preference shareholders is "prejudicially affected" by the scheme; although I think that, looking at it as a whole, they will be benefited, rather than prejudiced, by it. Bearing in mind, however, the importance of the matter to the parties, I think it is better that I should express my opinion in favour of the scheme generally, leaving the Petitioners to go to the Court of Appeal, if they think fit to do so, upon the point whether the assent of the preference shareholders is requisite. If it had appeared that this point had been brought before the Court of Appeal on the former occasion, of course, I should have been bound by their decision, and I should have followed it without any hesitation. But counsel are agreed that there is no trace of the Court of Appeal having dealt with this point, and, therefore, I have thought it right to express my opinion upon it.

Although I have allowed Mr. *Everitt's* client to appear, I cannot give him any costs.

W. L. C.

C A.

The company appealed from this decision. The appeal was heard on the 27th of January, 1892.

Cozens-Hardy, Q.C., and *Redman*, for the appeal:—

We contend that the scheme is to be looked at as a whole to see whether it "prejudicially affects" the interests of the preference shareholders, and if it does not then by sect. 15 their

assent is not requisite. The scheme is decidedly beneficial to them by capitalizing the £40,930 of interest which would otherwise have to be paid out of the revenue of the company before any person standing below the A debenture stock could get anything, by making the interest on one-half of the A debenture stock non-cumulative, which will entirely prevent the accumulation of arrears on that stock, and by placing the preference shareholders in a position which will give them an income as soon as the company have a surplus after paying the interest on the B debenture stock; whereas, as matters now stand, they can receive nothing till the interest on the C and D debenture stocks, which amount to more than half a million, has been paid. The scheme, therefore, does not prejudicially affect the preference shareholders, and their assent is not requisite.

The dissentient A debenture stockholder did not appear.

LINDLEY, L.J.:—

In this case I should be very glad if I could come to a conclusion different from that arrived at by Mr. Justice *North*; but I think upon the face of this Act of Parliament it is quite impossible.

What is the scheme of the Act of Parliament as regards arrangements? It is this: That a railway company who are unable to meet their engagements should prepare a scheme and lay it before the Court for confirmation, and provisions are made by which three-fourths in value of certain classes—as, for instance, debenture holders and preference shareholders—shall be able to bind a dissentient or non-assenting one-fourth, and in the cases referred to in sect. 15 the necessity for consulting them is removed. Wherever the question is a balance of convenience it appears to me that the scheme of the Act is that they are to be consulted. If there is no such question to lay before them, or if, in the language of sect. 15, the scheme to be assented to "does not prejudicially affect any right or interest of such class," then the Court can say that they need not be consulted. But unless the Court can say as a matter of law, or exercising its own natural sense, that no right and no interest of any particular

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class is prejudicially affected, then the Court is bound to say, "You must consult that class."

Now, can we say that by this scheme no right or interest of the preference shareholders is prejudicially affected? It is impossible for us to say so. I agree with Mr. Justice *North* in thinking that the scheme, as a whole, is beneficial to them; but that is for them and not for us to consider. It is impossible to escape from the language of this section. It is very much to be regretted that some of the preference shareholders—the *London and North Western Railway Company*, for example—do not either assent or dissent; but it appears to me impossible to say that it is unnecessary to obtain the assent of the requisite majority of the preference shareholders.

I have only to add, with respect to the decision of Vice-Chancellor *Malins*, that there must have been an oversight, for the language of the Act seems to me perfectly plain.

LOPES, L.J.:—

If it were not for the decision of Vice-Chancellor *Malins*, which has been referred to, I should have said that the matter we had to decide in this case was exceptionally clear. With regard to the decision of the Vice-Chancellor, I am unable to see how he arrived at it.

Under this Act of Parliament it is clear that, except in one case, which is referred to in sect. 15, the statutory assents mentioned in the Act must be given. Therefore, unless Mr. *Cozens-Hardy* can bring himself within sect. 15, he must fail.

Mr. Justice *North* has found, and I see no reason to doubt that he was correct in finding, that this scheme is on the whole beneficial to the preference shareholders; but it is perfectly clear that it prejudicially affects some of their rights. Then the question is whether, when we have to apply this sect. 15, we are to consider whether the scheme as a whole is beneficial to the class, or whether what we are to take into consideration is not whether any of their rights are prejudicially affected. It appears to me to be perfectly clear from the Act that, if there is any right which is prejudicially affected, although the balance of advantage may be in favour of the class, sect. 15 does not apply. The

words are most clear: "Provided that the assent to the scheme of any class of holders of mortgages, bonds, or debenture stock, or of any class of holders of a rent-charge or other payment as aforesaid, or of any class of guaranteed or preference shareholders, or of a leasing company, shall not be requisite in case the scheme does not prejudicially affect"—What? Not the rights as a whole, but "any right or interest of such class or company." In the present case it cannot be denied that some rights of the class are prejudicially affected, and, therefore, this section cannot assist Mr. *Cozens-Hardy*. The object of the Legislature appears to me to be very clear—viz., that this section is not to apply in cases where there is a balance of advantage and disadvantage, but that in such cases the matter should be submitted to the shareholders, that they may determine whether in their opinion the advantages exceed the disadvantages to such an extent as to make it desirable that the statutory assent should be given to the scheme.

KAY, L.J.:—

The scheme to be made binding by this Act can only be made so binding if the provisions of the Act are closely and exactly followed. The 17th section says that the Court is to confirm such scheme only when it has been assented to as required by this Act.

Now, the preference shareholders in this case have not assented —that is, three-fourths of them have not assented in writing. But it is said that under sect. 15 their assent may be dispensed with, because the scheme does not prejudicially affect their rights and interests as a whole. If those had been the words of the section, I should agree; but those are not the words of the section. The words of the section are, "does not prejudicially affect any right."

I assume that on the whole the scheme will be greatly for their benefit; but it is impossible to say that some of their rights are not prejudiced, though there may be a compensation by the way in which other rights of theirs are benefited. One of their rights, for example, is that the nominal value of their shares at present is £100. The scheme proposes to reduce that

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nominal value from £100 to £20. Therefore, it certainly prejudicially affects the right to be treated as shareholders for the nominal amount of £100 per share. The letter of the Act, therefore, is not complied with.

But is the spirit of the Act complied with? Is there any case in which the assent in writing of three-fourths of the preference shareholders can more properly be required than the case now put before us? Those who support the scheme say, "True, we prejudice some of your rights; but we benefit you to a much larger extent, and, looking at the whole purview of the scheme, the benefit is greater than the prejudice." To my mind, that is the very case in which the spirit of the Act requires that the shareholders shall judge for themselves, and if three-fourths of them choose to accept the benefit and the prejudice, believing that the benefit outweighs the prejudice, their decision binds the rest of the class.

I agree with every word of Mr. Justice *North's* judgment; and with regard to Vice-Chancellor *Malins'* previous decision, as I read his judgment, he seems to have said that, as none of the parties came to oppose, he might take them as assenting. That looks as if the learned Vice-Chancellor had forgotten that the assent is required by the Act to be in writing. Probably that was the error into which he for the moment was led.

Solicitors: *Dean & Taylor; Tibbitts & Tickner.*

H. C. J.

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[1890 H. 4335.]

Will—Construction—"Effects"—Real Estate—Indication of Testator's Intention.

A testator "gave, devised, and bequeathed" to his wife all his "furniture, goods, chattels, and effects" which he might be possessed of at his decease whatsoever the same might be or wheresoever the same might be situate, and authorized her to raise any money that might be necessary, and requested her to pay as soon as might be convenient all his just debts and funeral expenses; and after the death of his wife he "gave, devised, and bequeathed," to be equally divided amongst three of his children until they should attain twenty-one, "the furniture and moneys, or any property" which his wife might have become entitled to through his will or through any other source; and after they had attained twenty-one he directed that "the furniture, goods, chattels, and effects," whatsoever the same might be or wheresoever it might be situate, and any moneys his said wife might be entitled to at the time of his decease, should be equally divided amongst his six children. The testator's property consisted substantially of an undivided moiety of real estate, to which he was entitled in possession, his personalty being of very trifling amount:—

Held (affirming the decision of *Fry*, L.J., sitting as an additional Judge of the Chancery Division), that, taking into consideration the use by the testator of the words "devise," "wheresoever situate," and "property," and the direction to his wife to pay all his debts and funeral expenses, and other expressions in the will, there was enough to shew an intention that the testator's real estate should be included under the word "effects," and therefore that the undivided moiety passed by the will.

THIS was an appeal from a judgment of Lord Justice *Fry*, sitting as an additional Judge of the Chancery Division (1).

Henry Hall made his will, dated the 10th of March, 1883, which, omitting the merely formal parts, was as follows:—"I give, devise, and bequeath unto my dear wife, *Ann Hall*, for her own absolute use and benefit, free from the control of any future husband, all my furniture, goods, chattels, and effects that I may be possessed of at my decease, whatsoever the same may be or wheresoever the same may be situate; and I authorize my wife, *Ann Hall*, to raise any money that may be necessary, and

(1) [1891] 3 Ch. 389.

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to collect all amounts that may be due to me at the time of my decease, and request her to pay as soon as may be convenient after my decease all my just debts and funeral expenses; and I give, devise, and bequeath after the decease of my said wife, *Ann Hall*, to be equally divided amongst three of my children, if they should be living at the time of the decease of my said wife, *Ann Hall*—namely, *Olive Helena Hall, George Ellerson Hall*, and *Cecil Septimus Hall*—until they shall attain the age of twenty-one years, for their sole and separate use, the furniture and moneys, or any property which my said wife may have become entitled to through this my will or through any other source, for their sole and separate use, and after my said children, *O. H. Hall, G. E. Hall*, and *C. S. Hall*, have attained the age of twenty-one years, the furniture, goods, chattels, and effects, whatsoever the same may be or wheresoever it may be situated, and any moneys my said wife, *Ann Hall*, may be entitled to at the time of my decease, to be equally divided amongst my six children—namely, *O. H. Hall, G. E. Hall, C. S. Hall, Thomas Ellerson Hall, John Henry Hall*, and *Alfred Ellerson Hall*—that is to say, after the three first named children have attained the age of twenty-one years. I hereby declare this document to be my last will and testament, and I appoint my said wife, *Ann Hall*, sole executrix of this my will."

The testator died on the 20th of March, 1890. He was possessed of personalty of very small value, and was absolutely entitled to an undivided moiety of certain freehold and copyhold property, the legal estate in which was vested in the trustee of the will of his brother, *Thomas Hall*. The testator's eldest son, *Thomas Ellerson Hall*, claimed this moiety, alleging that it was undisposed of by *Henry Hall's* will. *Ann Hall*, the widow, commenced this action to establish her title to a life estate in it.

Lord Justice *Fry* held, upon the construction of the will, that the undivided moiety of the real estate passed under the word "effects," and that the Plaintiff was entitled to the relief she asked. The Defendant appealed from this judgment.

Haldane, Q.C., and *Bramwell Davis*, for the Appellant, cited

Camfield v. *Gilbert* (1), *Doe* v. *Earles* (2), *Doe* v. *Dring* (3), *Hogan* v. *Jackson* (4), *Smyth* v. *Smyth* (5).

Cozens-Hardy, Q.C., and *E. Ford*, for the Plaintiff, were not called on.

LINDLEY, L.J.:—

This is an inartificially drawn will, and I am not prepared to say that different minds may not put different constructions on it; but, to my mind, its meaning is pretty plain.

In order to explain the reason why I think Lord Justice *Fry* was right in his conclusions, I will state the position of affairs when the testator made his will. He was entitled under his brother's will, to half of his brother's residuary estate which consisted of some freehold and copyhold property. It was not reversionary; the testator was enjoying it, and was in possession of the rents and profits. It had not been actually divided, but he was in receipt of half the proceeds, and it was part of his available property. He was a married man and had a wife and six children, sons and daughters, and there is no expression in his will of any desire to make any provision for anybody else, and he gives whatever he does give to his wife and children. That is the general position of affairs. The will is badly drawn; it does not in terms apply to real estate in such a way as a conveyancer would refer to it. We are told that the will was drawn by a commercial traveller. It is obvious it was not drawn by a lawyer. Now this is the will. "I give devise and bequeath unto my dear wife *Ann Hall* for her own absolute use and benefit, free from the control of any future husband, all my furniture, goods, chattels, and effects that I may be possessed of at my decease whatsoever the same may be or wheresoever the same may be situate." Pausing there for a moment, it strikes anybody that the use of the word "devise" is not common with reference to pure personal estate. There is nothing there to indicate in actual terms real estate; but, on the other hand, the expression

(1) 3 East, 516.
(2) 15 M. & W. 450.
(3) 2 M. & S. 448.
(4) 1 Cowp. 299; 3 Bro. P. C. 338.
(5) 8 Ch. D. 561.

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of situation, "wheresoever the same may be situate," is hardly apt for personal estate. I do not mean to say that personal estate is not situate somewhere—of course it is—but you do not find that word usually used in a will passing personal estate. "Goods and chattels" would pass personal estate, and you do not want "effects." But you have "goods, chattels, and effects;" "effects" may mean something more than goods and chattels. It may mean only a particular kind, or it may be thrown in generally to sweep up any personal estate which the draftsman thought might not be included in "goods and chattels." Then he goes on in this way, and I attach some importance to this clause. "And I authorize my wife *Ann Hall* to raise any money that may be necessary, and to collect all amounts that may be due to me at the time of my decease, and request her to pay as soon as may be convenient after my decease all my just debts and funeral expenses." We should all agree that that is enough to charge his real estate with his debts, and it strikes me that is enough to give his wife power to sell his real estate in order to raise the money necessary. That is not conclusive, because it might give her power to do this, without indicating that she was to have anything herself. Still, the real estate is touched by that clause in some way or other. Then he goes on: "And I give, devise and bequeath after the decease of my said wife *Ann Hall* to be equally divided amongst three of my children if they should be living at the time of the decease of my said wife *Ann Hall*—namely, *Olive Helena Hall, George Ellerson Hall* and *Cecil Septimus Hall*—until they shall attain the age of twenty-one years"—therefore, it is plain they were infants—"for their sole and separate use, the furniture and moneys, or any property which my said wife may have become entitled to through this my will or through any other source, for their sole and separate use." Pausing there for a moment one is struck with the introduction there of the word "property." He refers to or describes that which he has given to his wife before as "property" although it is quite true he also refers to any other property she may be entitled to through any other source, whatever the effect of that may be. Then he says, "And after my said children *O. H. Hall, G. E. Hall,* and *C. S. Hall,* have attained the age of twenty-one

years, the furniture, goods, chattels and effects whatsoever the same may be or wheresoever it may be situated, and any moneys my said wife *Ann Hall* may be entitled to at the time of my decease"—there referring again to the "property" I have already called attention to, "to be equally divided amongst my six children," mentioning them all, including the eldest the heir-at-law, "that is to say, after the three first named children have attained the age of twenty-one years. I hereby declare this document to be my last will and testament, and I appoint my said wife *Ann Hall* sole executrix."

Now I ask anybody, lawyer or non-lawyer, whether it is possible reading that will and knowing what I have said, to miss seeing that the testator intends to dispose of all he has got among his wife and children. I quite appreciate the argument that you cannot disinherit the heir-at-law without plain words; but applying one's mind to this will, is it not obvious that it means what I have said?

Then it is said we cannot so decide because of the cases. There are three decisions which were principally relied upon, namely, *Camfield* v. *Gilbert* (1); *Doe* v. *Earles* (2); and *Doe* v. *Dring* (3), to which our attention has been called, and I think, reading them fairly, they shew that Mr. *Hawkins* is right when he lays down the rule he does on page 55 of his very accurate and well-known book. He says, "The word 'effects' is confined to personal estate, and does not include real estate, unless an intention appear to the contrary." I think that is right, but when you come to look a little closer and to see what these cases really decide, in my opinion they miss this case and by a very wide interval. In *Camfield* v. *Gilbert*, the first thing to observe is that the real estate there in question was not real estate the testator had ever enjoyed but it was reversionary. So it was in *Doe* v. *Earles*, and so it was in *Doe* v. *Dring*. In *Camfield* v. *Gilbert*, when you look at the will you will see it was a will addressed both to real estate and to personal estate. That part of it which dealt with real estate was not worded so as to pass the reversion in question, and it was contended that this

(1) 3 East, 516. (2) 15 M. & W. 450.
(3) 2 M. & S. 448.

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reversion passed under words which related to personal estate. The Court did not see its way to hold that. On the construction of that will I do not think any lawyer or non-lawyer would have said the reversionary interest passed under that portion of the will. In *Doe* v. *Earles* (1), again the real estate was real estate in remainder. There was no word "devise;" there were no words such as "wherever situate;" and there were no words "goods and chattels," but it was a general disposition of "all my effects." The Court said, that was not enough to pass real estate. I do not quarrel with that decision, but it does not touch this case. In *Doe* v. *Dring* (2), again the real estate in question was a reversionary interest and the language was a gift and bequest of effects and that was all. The Court had nothing else. Be it so. But can we say that any of those cases or any other cases in the books drive us to pronounce a decision which is in opposition to the intention of the testator as expressed by his whole will? His intention is plain, and in my opinion there is no decision or rule which ought to induce us to say it cannot take effect. If we are to look at authorities, the case of *Smyth* v. *Smyth* (3) goes further than this. But I do not rest upon authorities, I look at the will, and in my opinion, the testator intended this will to pass his whole estate.

LOPES, L.J.:—

I entirely agree. I do not rely much on authorities when we are called on to interpret wills like that which we have here. I look at the will and at the surrounding circumstances, and I can come to no other conclusion than that the testator intended to deal with the whole of his property. I think that Lord Justice *Fry* was quite right in the conclusion to which he came. My brother *Lindley* has gone into the matter very fully, and into the cases that have been cited, and I feel I can add nothing to his judgment.

KAY, L.J.:—

In this case there are, in the circumstances which existed when the will was made, and on the face of the will, several indications

(1) 15 M. & W. 450. (2) 2 M. & S. 448. (3) 8 Ch. D. 561.

which together form an accumulation which convinces me that the proper construction of this will, the construction which, I think, will lay down no canon to guide in the construction of another will, unless another will should be made in identical language, is that the whole of the testator's land was intended to pass. An argument has been addressed to us—a very ingenious and able argument, no doubt—which I have very often had occasion to consider, and it is this: There is an accumulation of, let us say, ten circumstances; any two, three, four, five, six, seven, eight, or nine of those taken alone would not do; the cases have decided that any three of them will not do; that any four of them will not do; possibly that any nine will not do. But do those cases decide that the ten will not do? Obviously they do not, unless you have an express decision of that kind; and to say that two or three, or even nine, alone will not do, is not convincing when you have got the whole ten to deal with; and you have, in addition to the nine, another incident which adds to the accumulation, and makes a different case. In this case, I think, the indications are about ten, and that is why I mentioned that number. In the first place, about a year before this will was made, the testator had come into actual possession of one undivided moiety of some real estate under his father's will. He was, as the Lord Justice has said, in the enjoyment of it. He makes his will about a year or a little more than a year after he has come into that possession. You hardly would suppose that he would forget the real estate which he was then in possession of. The will is not made by a lawyer. That is indication number two. He does not use the words "personal estate," in any part of his will. That is indication number three. The strongest of all, to my mind, in favour of a universal disposition of all the property he had is this, that the objects of his bounty are his wife and all his children. There is not the smallest indication on the face of the will that he intended to make an eldest son, as it is called—that is to say, to give to his eldest son any more than he gave to the rest of his children. Then the next indication I look at is, that you have the word "devise" used twice. A man, although he is not a lawyer, very probably has a notion that by using the word

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"devise" he would sufficiently indicate his intention to pass real estate. There is twice in the will the use of the words, "wheresoever the same may be situate," which are words commonly used in reference to real estate, and very uncommonly used in reference to personal estate. Then I find a direction to the wife, who is made sole executrix, to raise money to pay his debts, and I cannot doubt that that refers as much to real estate as to personal estate. Then, there is a small indication—very small indeed, if it stood alone—by the use of the word "property" as a referential word, "property" being much larger than the word "effects," which he has used before. Those are the indications which, taken together, not any two, three, four, five, or six alone, but taken together, bring me to the conclusion that the intention of this will, as indicated by its language and the facts I have referred to, was to dispose of all the property the testator was entitled to. The only other indication I need refer to, and I only refer to it to shew that I have given all the attention I could to the very ingenious and able argument we have listened to, is the effect of the words "to be divided." It is argued that the effect of the words "to be divided" is against the notion that real estate was to pass. I do not see that. They are used twice over; and, first, where he is speaking of division among his younger children till they attain twenty-one; but the most important use is where there are no words of actual devise, but where he is dealing with the ultimate division of all his property, and he uses these words, "to be equally divided among my six children." The six children were all he had, and he directs this property to be equally divided among his six children. It is common to see in a well-drawn will a direction of that kind for an equal division of property. Take the simple case: "I devise my real estate to all my children to be equally divided among them." Nothing is more common. A conveyancer would use those words, because the purport and effect is to shew that the children are to take equally, and as tenants in common; and those words are commonly used for that purpose. I do not find in those words any indication in the least adverse to the construction I put on the whole will; adding together all these small indications, the accumulated force of which convinces me that this will ought to

be treated as passing the real estate, I think this appeal should be dismissed.

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Solicitors: *Arthur E. Eves; S. S. Saul*, agent for *Steavenson, Darlington.*

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[1889 A. 818.]

Will—Forfeiture Clause—Annuity—Interference or Attempt to Interfere in Management of Estate—Frivolous Action against Trustees.

A testator gave his freehold estate at *R.* to two trustees in trust to pay certain annuities to the Plaintiff during his life, and after his death to the Plaintiff's unborn sons in fee; provided always, that if the Plaintiff should in any way intermeddle with or interfere in, or attempt to intermeddle with or interfere in, the management of the testator's real or personal estate, the said annuities were to cease. And the testator devised another estate to his daughter, *E. A.*, who was one of the trustees, and charged the same with the payment of his just debts whether secured by mortgage or otherwise in exoneration of his other lands; and he gave to *E. A.* the residue of his real and personal estates. The estate at *R.* was subject to a mortgage, but there was no evidence by whom it was created.

E. A. entered into possession of the estate at *R.*, and the trustees paid the annuities regularly to the Plaintiff, but did not pay off the mortgage. The Plaintiff brought an action against the two trustees, alleging that his annuities had not been paid; that *E. A.* had wasted the *R.* estate, and that the buildings were out of repair; and claiming to have the mortgage on the *R.* estate paid off, an account, an injunction, and a receiver.

The Court held, on the evidence, that none of the charges against the trustees were established:—

Held (affirming the decision of *Fry*, L.J.), that the action was groundless and frivolous, and was an attempt to interfere in the management of the estate; and that the Plaintiff, by bringing the action, had forfeited his annuities.

Held, also, that assuming that the mortgage on the *R.* estate was a debt of the testator's, and that the trustees ought to have paid it off, the Plaintiff, having forfeited his annuities, could not maintain the action on that ground.

THIS was an appeal from a judgment of Lord Justice *Fry* (1), sitting as an additional Judge of the Chancery Division.

The action was brought by *Henry Adams*, an annuitant under

(1) 45 Ch. D. 426.

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the will of his father, *Richard Adams*, against the trustees of the will.

The testator, by his will, devised his freehold farm and cottages, called the *Rydon* Estate, in *Devonshire*, to his daughter, *Emily Adams*, and *Charles Adams*, in fee, upon trust to pay out of the rents thereof an annuity to his wife for life and certain annuities to the Plaintiff for his life, and after the death of the survivor to stand seised of the said hereditaments upon trust for the Plaintiff's unborn sons in fee with remainder over; provided always, that if the Plaintiff should in any way intermeddle with or interfere in, or attempt to intermeddle with or interfere in, the management of the testator's real or personal estate, or if he should commit or suffer any act or default by means whereof, but for this proviso, the said annuities would become payable to any other person, the said annuities should immediately cease. The testator also devised to *Emily Adams* and her heirs other lands, and charged the same with the payment of his just debts, whether secured by mortgage or otherwise, and in exoneration of all his other lands. And the testator devised and bequeathed to his daughter, *Emily Adams*, all his rents and profits, and also all his real and copyhold lands and hereditaments not thereinbefore otherwise disposed of, and all his residuary personal estate.

The testator died on the 29th of November, 1861, and the will was proved by *Emily Adams* and *Charles Adams*, who were the executors named therein. The Plaintiff was the testator's only son and heir-at-law. The testator's widow died in May, 1876; the Plaintiff had no male issue. *Emily Adams* entered into possession of the *Rydon* estate. The *Rydon* estate was subject to a mortgage for £500, but there was no evidence that this was effected by the testator in his lifetime. The Plaintiff brought the present action against the two trustees, alleging that they had not paid him the annuities under the will, that they had neglected the care of the estate, and wantonly broken down the cottages and felled the trees, and that the *Rydon* estate was being wasted and the buildings destroyed, so that the rents had become insufficient for his annuities. He also alleged that he had been deceived by the trustees as to the terms of the will; and that he was entitled to some further interest than the annuities.

The terms in which these charges were made are specially referred to in the judgment of Lord Justice *Lindley*. He also raised a point upon the construction of the will, to which it is not necessary further to refer, as the Court held that it was entirely untenable. The Plaintiff claimed to have a proper construction of the testator's will declared; to have payment of the arrears of the annuities; to have the mortgage on the *Rydon* estate paid, discharged, and the real estate administered; accounts on the footing of wilful default; an injunction to restrain the Defendants from appropriating the trust moneys and occupying the trust estate for their private benefit, and from committing waste; and a receiver. The Plaintiff also asked at the trial to have the Defendant, *Charles Adams*, removed from the trusteeship.

The Defendants, in their defence, alleged that they had paid the Plaintiff the whole of the annuities due to him, and they denied that the estate was wasted, or the buildings out of repair, or that the rents were insufficient to pay the Plaintiff's annuities for the future. And the Defendant, *Emily Adams*, put in a counter-claim, in which she pleaded that the present action was an attempt to interfere in the management of the real estate, and claimed a declaration that the annuities given by the will to the Plaintiff had been forfeited and had ceased.

Lord Justice *Fry*, at the trial, held, that the Plaintiff had not proved any of his charges against the Defendants, and that the action was frivolous, and was an attempt to intermeddle with and interfere in the management of the real estate within the meaning of the will, and that the Plaintiff had thereby forfeited his annuities.

He accordingly dismissed the Plaintiff's action, and gave judgment for the Defendant, *Emily Adams*, on the counter-claim.

The Plaintiff appealed from this decision.

Badcock, for the Appellant:—

A forfeiture clause ought always to be construed strictly. The Plaintiff is not accused of personal interference with the trustees; the judgment was entirely based on his bringing this action. But the clause in the will only refers to personal interference; it does not forbid his taking legal proceedings to

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assert his rights; if it had done so it would have been void: *Rhodes* v. *Muswell Hill Land Company* (1). If the action brought is frivolous and not *bonâ fide*, the Court can punish the Plaintiff by making him pay the costs. But in the present case the action is not altogether frivolous; there is a *probabilis causa*, as in *Powell* v. *Morgan* (2). For the trustees have not carried out the directions of the testator in paying off the mortgage on the *Rydon* estate, on which the Plaintiff's annuities are charged, and his security is therefore lessened. He is, therefore, fully justified in bringing an action to have the directions of the will carried out.

H. M. Humphry (*Warmington*, Q.C., with him), for *Emily Adams*, was not called on.

Clare, for *C. Adams*, the other trustee.

LINDLEY, L.J.:—

This is an appeal from the decision of Lord Justice *Fry*, when sitting as an additional Judge in Chancery. The cause is reported (3), and for most purposes it will be sufficient to take the facts from that report.

[His Lordship stated the provisions of the will of *Richard Adams* as set forth above, and proceeded:—]

The Plaintiff, the annuitant, appears to have been in *America* for some time, and on the 25th of June, 1889, he issued a writ in this action complaining of the trustees, *Emily Adams* and *Charles Adams*, and making charges against them of a somewhat serious kind. The 7th paragraph of his statement of claim charges them with deliberate fraud, the fraud consisting of this, that when he was in *America* they represented to him that he was only entitled to such annuities as *Emily Adams* chose to pay, and that she was the absolute owner of the estate. There is no evidence at all in support of this charge. Then in paragraph 8 he says this: "The Defendants have not paid the Plaintiff's annuities, but only some occasional sums on account,

(1) 29 Beav. 560. (2) 2 Vern. 90.
(3) 45 Ch. D. 426.

and there is a large amount remaining due to him, therefor; they have appropriated the trust moneys to their private uses, have delegated their duties to others and neglected the care of the estate, have wantonly torn down the cottages, felled and sold the trees, wasted the estate, and since March, 1888, the Defendant *Emily Adams* has appropriated and is occupying the homestead and the best part of *Rydon* for her private use, and is wasting and destroying the buildings, whereby the rental has become insufficient for the annual charges, and they meditate and threaten to stop all future payments to Plaintiff." Those are the charges against the Defendants. I pass on to see what he claims. By paragraph 9 he claims "to have a proper construction of the testator's will; payment to him of the accumulated rents and profits, with compensation for waste, and the arrears of his annuities, or, in the alternative, to have the mortgage on *Rydon* discharged and the real estate administered; accounts on footing of wilful default; inquiries. The Plaintiff also claims an injunction to restrain the Defendants from appropriating the trust moneys or occupying the trust estate for their, his, or her private benefit, or committing further waste; and a receiver." That is the statement of claim.

Now, the case was investigated before Lord Justice *Fry*; evidence was taken, and every one of those charges which I have read fell to the ground. There was not a particle of evidence of any of them. Many of them were absolutely disproved. What was the view taken by the Lord Justice upon that? He said that this action was an attempt to interfere with the trustees within the true meaning of that proviso which I have read, and we are asked to say that that was wrong.

It appears to me that the Lord Justice took the view which is in accordance with authority, and in accordance with good sense. He said that if the Plaintiff had any reason to complain of his trustees and was seeking the protection of the Court to vindicate and establish his rights, that would not be such an interference as would amount to a forfeiture of his interest; but that this action was nothing of the kind; it was a frivolous and vexatious action, the object being to get a receiver appointed and to get the management of these estates out of the hands of the Defendants.

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That was the Plaintiff's object, and there being no pretence or ground for the action, the Lord Justice said it was an attempt (to use the words of the will) "to intermeddle with or interfere in the management of the testator's estate"; and that being so, he was of opinion that the Plaintiff's annuities had ceased and had become forfeited; and he made a declaration to that effect.

Now, is he wrong? I confess it appears to me that he is right. I think this is precisely one of the kind of things contemplated by the testator. Recollect, the testator was this man's own father. He very likely thought his son might create trouble, or he would not have put in such a clause as this. No doubt the clause includes attempting to interfere with the tenants, annoying them, and so on, but it does not exclude an attempt to get the management out of the hands of the trustees and put it into the hands of a receiver.

The only other thing about which a point is made is this. It appears that the *Rydon* estate was subject to a £500 mortgage. If that £500 mortgage was a debt of the testator, then it would be the duty of the trustees under this will to exonerate the *Rydon* estate from that mortgage and to pay it out of the other estates, upon which that debt would then be charged. Now, in the first place, there is no evidence that this £500 was the debt of the testator. If it was a debt of the estate before he became entitled to it, it would not be one of his just debts within the meaning of this clause. In the next place, it is said there was never any attempt on the part of the trustees before the action to exonerate *Rydon* from this £500. The annuities having all been paid in full, there was really no necessity to exonerate it, and there was no danger which was likely to arise to the Plaintiff's annuities by reason of the mortgage being allowed to remain on the estate. But there is this also to be considered. If we come to the conclusion, as we do, that the action is to be regarded as a vexatious, unwarrantable, and frivolous interference in the management of the estate—an interference of the character which comes within the terms of the clause of the will to which I have alluded—then the Plaintiff in bringing the action had forfeited his interest in these annuities; and if he had forfeited his interest in these annuities, he was no longer concerned in getting the

Rydon estate exonerated. Mr. *Badcock*, of course, feeling the difficulty he is in, has, with great sagacity and skill, fastened on this £500. I am satisfied that it is a mere straw thrown in for the purpose of saving the costs of the appeal. The appeal ought to be dismissed, with costs.

LOPES, L.J.:—

The learned Lord Justice has found, and I think rightly found, that this action was frivolous and vexatious, and then having so found, he puts an interpretation upon the words of forfeiture contained in the will. Those words of forfeiture are these: "If he should"—that is, his son *Henry Adams*—"in any way intermeddle with or interfere in, or attempt to intermeddle with or interfere in, the management of the estate, the annuity shall immediately cease." The learned Lord Justice seems to have interpreted those words in this way. He holds that if this had been a *bonâ fide* action brought for the purpose of vindicating the annuitant's rights, then it would not have been such an intermeddling and interference as is contemplated in this proviso. But if, on the other hand, it was, as he holds it is, a frivolous and vexatious proceeding on his part, then it is that sort of intermeddling and interfering which is contemplated by the testator. I think the Lord Justice is perfectly right, first, in holding that what was done was frivolous and vexatious, and then, that being frivolous and vexatious, it was the kind of thing which the testator contemplated when he inserted that proviso in his will.

Then the question arose as to this £500 mortgage from which the *Rydon* estate was to be exonerated. I think there are four answers to the point which was made with regard to that. In the first place, no application was ever made to the trustees to pay the mortgagee off and exonerate *Rydon*. Then, again, there is no evidence that this mortgage debt was the debt of the testator at all. Then, thirdly, there is no evidence that the annuities were in any way imperilled by this mortgage subsisting. And then, lastly, probably the strongest point of all, I think the right to insist on the payment of the mortgage was lost by the forfeiture; and, on those grounds, I think the

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conclusion which the Lord Justice arrived at is correct, and that this appeal should be dismissed with costs.

KAY, L.J.:—

I agree with my learned brethren, and I only add a few words to point out that, in coming to this decision, we are acting exactly in conformity with well-considered cases.

In the well-known case of *Rochford* v. *Hackman* (1), Lord Justice *Turner* decided (and his decision has been followed again and again, and has never, that I know of, been dissented from), that if there be a gift of a life estate to *A.*, and then a remainder over to other people, with a proviso that that life estate shall cease upon a certain event happening, that is not a clause of forfeiture, but it is a limitation till that event happens, and then over. The very same construction has been applied in a case of an annuity for life, the estate being given subject to that annuity. If the annuity is made to cease upon a particular event happening, in effect a will so framed amounts to a gift of the annuity till that event happens or till the annuitant dies, whichever may first occur, and then the gift of the estate is subject to the annuity while it is in existence.

Now the report of the proceedings in this action in the Court below, which is to be found in the Law Reports, has been read, and I will not read it again. The important thing is, that the forfeiture, or perhaps it is more proper to call it the limitation over, is to take effect not only upon a certain thing being done, that thing being an interference in or intermeddling with the management of the testator's estate, but upon an attempt to do it. The very point arose in the case of an annuitant in *Martin* v. *Margham* (2). The decision there was a decision of the Vice-Chancellor of *England*, and is recognised and approved by Lord Justice *Turner* in *Rochford* v. *Hackman*. In *Martin* v. *Margham*, the head-note is this: "Testator, after giving several annuities, begged it to be understood that if any of his annuitants should attempt to sell or dispose of their interest in his annuities to them (which he wished only for their peculiar and particular benefit), from that moment, his bequest to them was to terminate

(1) 9 Hare, 475. (2) 14 Sim. 230.

for ever, and the principal and interest of each bequest to revert to his general fund. One of the annuitants petitioned for the benefit of the *Insolvent Debtors Act*, having entered the annuity in his schedule, together with the effect of the clause in the will above-mentioned, and, afterwards, the usual vesting order was made by the Insolvent Debtors' Court. Held, that his annuity ceased on his presenting the petition." The vesting order is not made till afterwards; but it was held that the presenting of the petition was an attempt to alienate the annuity, which caused its cesser. Therefore I say in this case, that the attempt to intermeddle with or interfere in the management of this estate by an action asking for the appointment of a receiver, the effect of which would be to take the management of the estate out of the hands of the trustee if a receiver should be granted, and asking for that upon grounds which are entirely frivolous and vexatious, not one of which is made out, was an attempt to interfere with the management of this estate, which, in the very terms of the will, occasioned the cesser of the annuities; it was one of the elements of the duration of those annuities; and upon that attempt being made, the annuities, by the terms of their creation, came to an end.

I entirely concur in what Lord Justice *Fry* said in his judgment to the effect that if this had been a *bonâ fide* action brought in defence of Plaintiff's rights, it should not be held to be an attempt to interfere with the management. If this had been a *bonâ fide* action brought for the protection of the annuitant—if, for example, the annuities had been improperly withheld from him, and he could not get them without suing for them—even if he had asked for a receiver in a case of that kind, I am not at all prepared to say that that would have been such an attempt as would have come within the proviso; and for that again there is distinct authority in the case which was cited, I observe, in the Court below, namely, *Powell* v. *Morgan* (1), in 1688. There was a similar provision in that case, and the judgment is given in two lines: "There was *probabilis causa litigandi*, and it was not a forfeiture of the legacy." Those are pregnant words, and they shew that if there had not been an excuse for litigation, *probabilis causa*, the Court in that case

(1) 2 Vern. 90.

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would have held that it was a forfeiture. Here there was no excuse whatever for any part of this litigation; no excuse can be given even now on this appeal, except perhaps on one little point to which Lord Justice *Lindley* has referred, about the incidence of the mortgage, and the trustees not performing the trusts and provisions of the will with regard to it. If it was a mortgage made by the testator, a debt of his, then according to the trusts of his will he charged one estate which he devised with that mortgage in exoneration of all other estates charged by the will. We have no evidence that this was a debt of the testator. We are asked to assume that, in favour of such a litigant as this. I, for my part, will assume nothing of that sort. When he brings an action, the main part of which is entirely vexatious and frivolous, he is the last sort of litigant in whose favour anything, in my opinion, should be assumed or presumed. Therefore, as he has not proved that, that alone would be sufficient to dispose of it. But it seems to me that the complete answer is this. This action being an attempt, on most frivolous grounds, to interfere with the trustee and obtain a receiver to displace the trustee, caused a forfeiture of his annuities, or caused the annuities to cease according to the terms of the will, and, therefore, he had no longer any interest in the question whether this mortgage, supposing it to have been a mortgage of the testator, should be thrown upon the particular estate charged with it by the will. Accordingly, having ceased by the commencement of the action (as I hold he did) to have any right to these annuities, he could not have obtained a decree on the other point. Supposing he had made out a case for the exoneration, the answer would have been: "Looking at the other points which are raised by this action, you have no longer any interest in the annuities, therefore you are no longer a person who can sue for and obtain the exoneration."

For these reasons, I agree with the decision of Lord Justice *Fry*, and therefore the appeal must be dismissed with costs.

Solicitors: *Crowders & Vizard; H. W. Reeves*, agent for *T. C. & G. F. Kellock, Totnes; Torr, Janeways & Co., for Eastley, Jarman, & Eastley, Paignton.*

M. W.

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In re RICHERSON.
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[1890 R. 753.]

Conversion—Land devised in Trust for Sale—Partial failure of Trusts—Intestacy—Real or Personal Estate.

Where real estate is devised upon trust for conversion into personalty, to be held upon trusts which in the result partially fail, the proceeds of the land sold and the land (if any) unsold both result to the heir as personal estate.

THE testator, *John Richerson*, died in 1864, having by his will devised his real estate upon trust for sale, and directed that the proceeds should form part of his residuary personal estate. He then bequeathed his residuary personal estate, subject to certain life interests to a class on a contingency; but such class, by reason of deaths and other circumstances, were unable to take. The trusts of his will, however, did not entirely fail, but continued to be executed during the life tenancies from 1864 to 1890, when they finally came to an end and the period of distribution arose.

Sales of the real estate had been made from time to time; but some portion still remained unsold.

It was admitted that owing to the failure of the contingent class there was a resulting trust as to the devised realty for the testator's heir, who was his sister. She had, however, died in 1872 intestate, and the present question arose between her heir and her legal personal representatives. The heir of the heir admitted that the legal personal representatives of the heir were entitled to the proceeds of sale of the real estate actually sold at the time of distribution, but contended that he was entitled to the unsold real estate.

Levett, Q.C., and *Sargant*, for the next of kin of the heir:—

This is a case of partial failure of the purposes for which conversion was directed, and the property reverts to the heir or legal personal representative, as the case may be, in its

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converted state. In this case it reverted to the heir as personalty, and as between her real and personal representatives there is no equity to reconvert it.

The true rule is that the heir takes the property in the state in which he ought to find it, no matter what its actual condition may be: *Curteis* v. *Wormald* (1); *Smith* v. *Claxton* (2); *Attorney-General* v. *Lomas* (3); *Attorney-General* v. *Marquis of Ailesbury* (4).

Farwell, Q.C., and *Kenyon Parker*, for the heir of the heir:—

The property reverted to the heir; but she took it as she found it—that is, in the actual condition it was in when she took it—and being land when she took it her heir is entitled, and not her next of kin: *Ackroyd* v. *Smithson* (5); *Chitty* v. *Parker* (6); *Singleton* v. *Tomlinson* (7): *Lord Compton* v. *Oxenden* (8); *Wilson* v. *Coles* (9); *In re Newberry's Trusts* (10).

The cases of *Davenport* v. *Coltman* (11), *Jessopp* v. *Watson* (12) and *Attorney-General* v. *Lomas*, are distinguishable.

Byrne, Q.C., and *Marcy*, for the legal personal representative of the testator.

Levett, in reply.

CHITTY, J. (after stating the facts, continued):—

In the execution of their duty the trustees sold the land from time to time; but they had not sold all the land in 1890, and some still remains to be sold. It is quite true that at the present moment there is no person who claims by gift under the will who can ask for the execution of that trust for sale. It is clear, under these circumstances, that notwithstanding this absolute trust for conversion, the heir of the testator took the property by way of resulting trust, and that his title vested in 1890. Now, the heir died in the year 1872, and the contest

(1) 10 Ch. D. 172.
(2) 4 Madd. 484.
(3) Law Rep 9 Ex. 29.
(4) 12 App. Cas. 672.
(5) 1 Bro. C. C. 503.
(6) 2 Ves. 271.
(7) 3 App. Cas. 404.
(8) 2 Ves. 261.
(9) 28 Beav. 215.
(10) 5 Ch. D. 746.
(11) 12 Sim. 588.
(12) 1 My. & K. 665.

is not between the testator's next of kin and the heir, but between the heir of the heir on the one hand, and the legal personal representatives of the heir or the persons entitled to his personal estate on the other. For the persons entitled to the heir's personal estate it is argued that, there being in this will an absolute trust for conversion, their title vested in interest on the death of the heir. For the heir of the heir it is contended that the title shifted from time to time and as sales were made, and that as each sale was made the title of the heir of the heir was divested and passed to the heir's next of kin. Inasmuch, however, as some portion of the real estate remains unsold, it is argued for him—that is, the heir of the heir—that the right rule is that, there being no equity between the real and personal representatives of the deceased heir to reconvert the property, it must be taken in the actual state in which it is. On the other hand, on behalf of the next of kin or the persons entitled to the personal estate of the heir, it is argued that the title was fixed at her death by reason of the trusts of the will. It is true, as I have said, that the heir of the heir does not claim as a person to whom a benefit is given directly in terms by the will, but it is quite clear that he takes by way of resulting trust, and the proposition which is stated by *Jessel*, M.R., in *Curteis* v. *Wormald* (1), appears to me to be a correct way of putting the case. Having referred to *Ackroyd* v. *Smithson* (2), he says: "The result is that in the case I put there is a trust for the next of kin." He is there dealing with the converse case of personal estate directed by the will to be applied in purchasing real estate; and merely altering the language to make it suit this corresponding case, I adopt his expression, and say that there is a trust for the heir. But a trust for the heir of what? Clearly, a trust of the personal estate. It appears to me that the decisions have always gone upon the footing that the heir who takes under circumstances such as these takes the property in the state into which it is converted by the will. Where there is a partial undisposed interest of real estate directed to be sold, that interest results to the heir of the testator and it becomes personal estate in his hands; of course, so long as he is alive it

(1) 10 Ch. D. 172. (2) 1 Bro. C. C. 503.

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is immaterial whether it is real or personal estate; but on his death it seems to me, that on principle as well as by virtue of the authorities which are summarized in *Jarman* on Wills (1), that the proposition I have just stated is correct, and I do not remember in my experience to have heard it questioned. There is the other proposition, namely, that, if the purposes of the direction for conversion in the will wholly fail—that is, if all the legatees of the moneys to be produced by the sale die in the testator's lifetime, so that there is a total failure of the objects for which the conversion was to be made—the property will devolve upon the heir as real estate. But I have to deal with the case of partial failure. If the argument for the heir of the heir is correct, it is difficult to understand why the numerous authorities which distinguish the cases of total and partial failure should have ever been brought into controversy. It would have been sufficient to say, "Never mind what the trusts of the will are; whether it is an absolute conversion or not, all you have to do to ascertain the rights of the real and personal representatives of the heir is merely to look to the actual state in which the property is, and there is an end to the question." Now, the case is really covered by direct authority, and, notwithstanding the ingenious argument that I have heard, it seems to me that, dealing with the report of *Jessopp* v. *Watson* (2) in the only way I know how to deal with reports—that is, by taking the facts as they are stated, and not making numerous ingenious suggestions as to what the facts may have been—the Master of the Rolls, Sir *John Leach*, decided this question in 1833. There was there an absolute trust for conversion; but it appears by the report on page 669 that some part of the estate had not been converted, and the Court directed that there should be an inquiry as to whether it would be for the benefit of the infant who was entitled that the real estate of the testator should be sold pursuant to the directions in his will. It is plain that there was no trust expressed as a beneficial trust in the will which remained to be performed. The suggestion made by counsel was that there were some trusts in the will, beneficial trusts, which had not been fully executed; but this is answered at once by this fact, that this

(1) 4th Ed. vol. i. p. 630. (2) 1 My. & K. 665.

inquiry was directed and in a form which could only have been directed if the infant was considered to be entitled to the property free from all claims of any person under the direct trusts of the will, and it was there decided that the property passed and was taken as personal estate by the persons entitled. That decision would be a sufficient authority for me. There is, however, a decision of the Court of Exchequer in the Revenue case of *Attorney-General* v. *Lomas* (1), and, taking the judgment as it stands, it is clear that the Court was of opinion that the circumstance whether the land had or had not been sold was considered as immaterial. It is rightly pointed out by counsel for the heir of the heir that, in point of fact, the real estate had, at the time judgment was given, been sold; but that circumstance is not mentioned in the judgment, and, indeed, the judgment—if the argument of the heir of the heir is right—could have passed by all the matters which are so carefully dealt with, and simply said there is no equity between the real and personal representatives of the heir, and the property which has been sold must *ipso facto* go as personalty. These two authorities are binding on me; but I pointed out in the course of the argument, and I repeat in my judgment, the extraordinary result that would arise if the argument of the heir of the heir is well founded, because, according to this argument, the property would shift from time to time as the trustees in the execution of their duty thought fit to sell; and there is this extraordinary result, that if the trustees, being bound by the imperative directions to make a sale, should omit, for good or bad reasons, to sell, and commit that which would be a breach of trust on their part, the result would be that the rights of the persons claiming under the heir would be altered. As a rule, the defaults of trustees do not alter the rights of beneficiaries, and I can see that there would be the greatest inconvenience arising if I should give any countenance to this argument. On the death of the heir the probate of his will, supposing he made one, would have been obtained, and I have no doubt the construction of this will before me would then have been ascertained. Of course, it was merely a question whether it should be ascertained then or hereafter.

(1) Law Rep. 9 Ex. 29.

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The Revenue would have been entitled to duty on the footing that at the time of his death he had a reversionary interest in the proceeds of real estate, and supposing the will before me was one not giving rise to any question of construction, but so framed that there was, first, a trust for sale, then certain tenancies for life, and on the face of the will a plain omission to dispose of the ultimate beneficial interest, the Crown would have asked, on the heir's death, what were the duties payable in respect of his beneficial interest in the trust for sale, and to say that from time to time they are to be shifted according to the sales made or not made by the trustees would be producing, as I have mentioned, this extraordinary anomaly, namely, that there would be at one time succession duty payable, which in the result would not be payable at all, and at some other time there would be legacy duty under the *Legacy Duty Acts* which after all might not become payable when the result was known because the trust for sale was not in the event acted on.

I am of opinion that the heir—that is, the testator's sister, *Sarah Scales*—took, by virtue of the resulting trust, the property in question as personalty; so that the property which has been sold, about which there is no question, and the property which has not been sold, about which there is a question, belongs in each case to the personal representative of the heir.

In *Curteis* v. *Wormald* (1) the same point arose. It appears from the papers that there was a small sum of about £50 which ought to have been laid out in real estate, but which had not been so laid out. The indorsement on counsel's brief, however, contains the words, "no question decided as to personal estate (if any) not so laid out in buying real estate"; so the point was then left undecided. I think the language of *Jessel*, M.R., negativing any equitable reconversion as between the real and personal representatives of the heir, is accurate, and that he meant what he said.

Solicitors: *Morgan, Price, & Mewburn; E. Robinson*, agent for *Grigson & Robinson, Watton, Norfolk; Barlow & James*, agents for *Winter, Swaffham.*

(1) 10 Ch. D. 172.

G. M.

FITZGERALD'S TRUSTEE *v.* MELLERSH.

CHITTY, J.

1892

Jan. 12, 13, 21

[1891 F. 258.]

Equitable Mortgagee—Memorandum of Deposit—Six Months' Notice—Interest in lieu of Notice.

An equitable mortgagee by deposit of title deeds of land accompanied by a memorandum of deposit is not entitled to six months' notice before he is bound to accept a tender of the amount due, nor to six months' interest in lieu of notice.

In the case of a regular mortgage deed with a proviso for redemption the just inference is that the loan on mortgage is intended to be of a permanent character, and that the parties intended that after default the mortgagee should be entitled to a six months' notice; but where the just inference from the transaction is that the mortgage is merely temporary, as is the case where the mortgage is in the usual form by deposit merely, then it is not reasonable to infer that the parties intended that notice should be given.

FITZGERALD, in order to secure certain moneys advanced to him by the Defendants, who were a firm of bankers at *Godalming*, deposited with them the deeds of certain freehold property belonging to him, together with a memorandum by which he undertook to execute a legal mortgage on request.

No day was named for payment, and no request to execute a legal mortgage was ever made. The land was subsequently sold pursuant to an arrangement between the mortgagor and mortgagees.

The mortgagor became bankrupt, and in taking the account of the moneys due to the bank the question arose whether the bank was entitled to six months' notice before it was bound to accept a tender of the amount due or to six months' interest in lieu of notice.

Byrne, Q.C., and *Upjohn*, for the Plaintiff:—

The question is whether an equitable mortgagee by deposit of title deeds is entitled to six months' notice before he accepts a tender of the amount due on the security, or to six months' interest in lieu of notice.

Where there is a regular legal mortgage with a proviso for

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redemption it is absolutely clear that the mortgagee is entitled to six months' notice or to interest in lieu of notice: *Browne* v. *Lockhart* (1); *Smith* v. *Smith* (2); *Bartlett* v. *Franklin* (3). All the text-writers state the rule to be as laid down in the cases cited, but not one of them intimates that the rule is applicable to a mortgagee by deposit.

The rule has no application to an ordinary loan of money where no day is named for payment, and where there is no conveyance of the legal estate.

[They referred to *Fisher* on Mortgages (4); *Coote* on Mortgage (5); *Powell* on Mortgages (6); and also to *Letts* v. *Hutchins* (7); *Walsh* v. *Lonsdale* (8); *Day* v. *Day* (9); and *Bank of New South Wales* v. *O'Connor* (10).]

Levett, Q.C., and *Manby*, for the mortgagees:—

The rule is a well-established one, and applies as well to an equitable mortgage by deposit as to a legal mortgage with a proviso for redemption. It makes no difference that the legal estate is not in the mortgagee.

The reason for the rule is that the six months' notice gives the mortgagee time to look out for another investment for his money. It would be most inequitable if the mortgagor could come down at any time on the mortgagee without any notice at all with the money and demand back his deeds.

Byrne, in reply.

CHITTY, J.:—

The amount in dispute is small; but the question involves a matter of considerable importance. The question is whether an equitable mortgagee, by deposit of title deeds of land accompanied by a memorandum of deposit, is entitled to six months' notice before he is bound to accept a tender of the amount due or to six months' interest in lieu of notice. The memorandum

(1) 10 Sim. 420.
(2) [1891] 3 Ch. 550.
(3) 15 W. R. 1077.
(4) 4th Ed. p. 734, s. 1226.
(5) 5th Ed. p. 1174.
(6) 6th Ed. p. 934.
(7) Law Rep. 13 Eq. 176.
(8) 21 Ch. D. 9.
(9) 31 Beav. 270.
(10) 14 App. Cas. 273.

in this case contains an undertaking by the mortgagor to execute a legal mortgage on request; but no request has been made, nor can any now be made, as the land has been sold pursuant to an arrangement between the mortgagor and the mortgagee. The undertaking, therefore, may be disregarded. The memorandum limits no time for repayment. The mortgagee has not called in the money, nor taken any steps to enforce his security. The mortgagee is willing to accept three months' interest only; but this is by way of concession. His claim is founded on his supposed right to six months' notice. There are two authorities on the question of the right of a mortgagee to six months' notice or interest in lieu of notice. The first is *Browne* v. *Lockhart* (1). From the report I gather that that case was one of a regular mortgage carrying the legal estate, with a proviso for redemption. In that case, Vice-Chancellor *Shadwell*, after stating that it was the usual practice for a mortgagor when he intends paying off a mortgage to give a proper notice of his intention so to do, said that he apprehended that there was no law of the Court of Chancery, or any other Court, which required that to be done; that it rested entirely upon custom; and that the custom was founded on this—namely, that it is but fair that the party who has lent his money upon the security should have a reasonable opportunity before the transaction is put an end to of finding some other security on which he may lay out his money when it has been repaid to him. The observations of the Vice-Chancellor were, as I apprehend, addressed to the case which was before him of a regular legal mortgage, and I understand that he intended to affirm the right of the mortgagee in such a case to the usual six months' notice. The other authority is *Smith* v. *Smith* (2). In that case the mortgage was of a reversionary interest in a trust fund, and it appears to have been made by a formal deed with the usual proviso for redemption. It was there held that the mortgagee was not bound to accept the money except upon a six months' notice or payment of interest in lieu of notice. There is also the decision of Vice-Chancellor *Malins* in *Bartlett* v. *Franklin* (3), which, I understand, was also the case

(1) 10 Sim. 420, 424. (2) [1891] 3 Ch. 550.
(3) 15 W. R. 1077.

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of a regular mortgage of a fund in Court. It was there held that the mortgagee was entitled to six months' notice or interest in lieu of notice. There is no express authority, so far as I am aware, that the rule as to six months' notice or interest applies to the simple case of a mortgage by deposit of deeds. This form of security is now in very common use between bankers and their customers and among commercial men and others where a temporary loan is required. It was admitted by counsel for the mortgagee that it is not the practice amongst bankers or commercial men to require six months' notice or interest; and, so far as my experience goes, this admission is in accordance with the fact. It was argued, however, for the mortgagee, that the rule existed although it was not insisted upon. There was no evidence one way or the other as to the practice. The text-writers state the rule, but not one of them intimates that it applies to a mortgagee by deposit. I have referred to *Coote* on Mortgage (1); *Powell* on Mortgages, by *Coventry* (2); and *Fisher* on Mortgages (3). In the first edition of *Coote*, the rule is thus stated: "It has become a settled rule in equity that a mortgagor must, after default made by him in payment of the money according to the proviso in the mortgage deed, give the mortgagee six calendar months' notice of his intention to pay off the mortgage unless the mortgagee has demanded or taken any steps to compel payment; in which latter case, not any notice is requisite; and it has been considered that if the mortgagor be willing to pay six months' interest in advance, notice will be unnecessary." The passage in *Powell*, and the note by *Coventry*, are substantially to the same effect. *Fisher* states the rule thus: "After default, the mortgagee is generally entitled to notice before his security is discharged by payment; the reason of which is said to be that the mortgagor having lost his estate at law, and being only entitled to redeem in equity, must do equity by allowing a reasonable opportunity for the mortgagee to find a new security for his money; for which six months is treated as the proper time. . . . By a rule of practice the mortgagee is entitled to six

(1) 1st Ed. (1821) p. 553; 4th Ed. (1880) p. 1087; 5th Ed. (1884) p. 1174.

(2) 6th Ed. (1826) p. 934.

(3) 4th Ed. (1884) p. 734, s. 1226.

months' interest in lieu of notice." One of the reasons given by *Fisher* and *Coventry*, viz., that the estate of the mortgagee has become absolute at law, applies only to a mortgage conveying the legal estate; the other given by the text-writers, viz., that the mortgagee ought to have a reasonable time to find a fresh mortgage, would apply to a mortgage by deposit. But they all speak of the mortgagee's right after default. Where no time is limited for the repayment of the debt, as is almost universally the case where the mortgage is by deposit, there is nothing to prevent the mortgagee from calling in his money at once, and it is inappropriate language, to say the least of it, to speak of the mortgagor being in default because he does not pay on the next day after the loan is made. There being, then, no authority on the point, I must decide this question on principle; and, on principle, I think that an equitable mortgagee by deposit is not entitled to six months' notice. The true ground for the rule, where it applies, appears to me to be that it is equitable or, what is the same thing, reasonable to apply it. If I applied the rule to the case before me I should be inflicting great hardship on persons who give such securities. Money is generally borrowed on them for a short time only, and often at a higher rate of interest, because it is expected that the loan will shortly be paid off. Having regard to what has been and what has not been decided, I venture to express the rule thus: Where the just inference from the transaction is that the loan on mortgage is intended to be of a permanent character, it is reasonable to infer that the parties intended that after default the mortgagee should be entitled to a six months' notice. That appears to be the just inference whenever there is a regular mortgage deed with a proviso for redemption. This point is covered by the authorities. But where the just inference from the transaction is that the mortgage is merely temporary, as I think is the case where the mortgage is in the usual form by deposit merely, then it is not reasonable to infer that the parties intended that so long a notice should be given. I do not say that the mortgagor may suddenly pounce down on the mortgagee without any notice at all with the money and demand back his deeds. He must not act unreasonably or vexatiously; he must at least give the mortgagee a reasonable

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time, though it may be short, to look up the deeds. Even the mortgagee, when the loan is payable on demand, must give a reasonable notice to the mortgagor to enable him to find the money: *Toms* v. *Wilson* (1), and *Brighty* v. *Norton* (2). The circumstance that six months is always allowed to the mortgagor on a judgment, whether of redemption or foreclosure, has nothing to do with the question. The six months is allowed to the mortgagor as a reasonable time in which to find the money before his right to redeem is barred, whether by the dismissal of the action to redeem or by the order making the foreclosure absolute. The rule, where it applies, does not seem to be founded on the length of time allowed for redemption by the proviso, which may be less than six months or may be more; sometimes the money is lent for a term of years. The period of six months is adopted as being generally reasonable, just as in the case of a tenancy from year to year, where the notice to determine the tenancy must be reasonable, and six months has long ago been established at Common Law to be the reasonable period.

The debt will carry interest up to the date of actual payment; but no further interest in lieu of notice is payable.

Solicitors: *Ward, Perks, & McKay; John Patrick Murrough,* agent for *R. E. & T. B. Mellersh, Godalming.*

(1) 4 B. & S. 442. (2) 3 B. & S. 305.

G. M.

In re ENGLISH BANK OF THE RIVER PLATE.

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Jan. 16, 20.

Company—Winding-up—List of Contributories—Official Receiver—Provisional Liquidator—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63)—*Companies (Winding-up) Rules,* 1890, *r.* 83.

The term "liquidator," mentioned in rule 83 of the *Companies (Winding-up) Rules,* 1890, includes the Official Receiver when acting as provisional liquidator, and therefore the list of contributories of a company settled by the Official Receiver while acting as provisional liquidator of a company which has been ordered to be wound up by the Court is rightly settled.

PROCEDURE SUMMONS.

The petition for winding-up this company by the Court was presented in July, 1891, and on the 1st of August following the winding-up order was made, and the Official Receiver, under the *Companies (Winding-up) Act,* 1890, became the provisional liquidator.

The statutory meeting of contributories was held on the 15th, and the meeting of creditors on the 17th, of December, 1891, when it was unanimously resolved that a Mr. *Welton* should be appointed official liquidator with a committee of inspection.

Between the date of the winding-up order and the statutory meetings of December, when the statement of the affairs of the bank was submitted by the Official Receiver, he had as provisional liquidator settled the list of contributories.

This was a summons taken out by the Official Receiver asking that directions might be given as to the settlement of the list of contributories so settled by him while acting as provisional liquidator.

Latham, Q.C., and *Howard Wright,* for the Official Receiver, after referring exhaustively to the sections of the *Companies (Winding-up) Act,* 1890, and the rules made in pursuance of the Act, contended that the term "liquidator" in rule 83 included the Official Receiver when acting as provisional liquidator, and that it was competent for such Official Receiver to settle the list of contributories, and that if it was held that he could not so settle the list, there would, in cases where the winding-up was

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Farwell, Q.C., and *S. Dickinson*, for contributories, argued that under the Act the only person who was empowered to settle the list was the official liquidator when appointed, whether he is the Official Receiver or such other person as shall be appointed at the request of the contributories and others, and that even he could not then settle the list without the leave of the Judge, which leave had not been obtained.

Latham, in reply.

CHITTY, J.:—

The question is whether the officer styled the Official Receiver, when acting as liquidator provisionally, after an order made for winding up a company by the Court, can settle the list of contributories.

Counsel have given me every assistance. I think they have gone through the Act of 1890 almost section by section that has any possible bearing on the point, and they have gone also through all the Rules of 1890 which it is considered on one side or the other can throw any light on the subject, and complete reference has been made also to the Act of 1862. It would be, I think, useless for me to attempt to go through all these various matters in detail. I will state in general terms, and with very few observations, the conclusion at which I have arrived.

The 83rd rule of the Rules made in pursuance of the Act of 1890 runs thus: "The liquidator shall, with all convenient speed after his appointment, settle a list of the contributories." The 2nd rule defines "liquidator" as including an Official Receiver when acting as liquidator. Consequently, when the Official Receiver is so acting, he is liquidator *primâ facie* within the 83rd rule.

The position of the Official Receiver under the Act of 1890 with reference to the point I have to decide is this: so soon as the winding-up order is made, he becomes, by virtue of the express provision of the 4th section of the Act, the "provisional liquidator."

The term "provisional liquidator" was not used in the Act of 1862. It was, however, commonly used in Court with reference to the officer who was appointed provisionally.

Now, as I say, it is in virtue of the section itself that I have just referred to that the Official Receiver becomes provisional liquidator, whatever is meant by that term. Under the Act (and I shall not refer to the sections), it is competent for the Court to appoint, and it is competent for him to accept, the office of provisional liquidator before the winding-up order is made at any time after presentation of the petition, and in the section which confers that jurisdiction on the Court and which capacitates him to accept the appointment, the term "provisional liquidator" is again used.

There is no express definition in the Act of 1890 with reference to the powers of the provisional liquidator. Those powers have to be made out by putting the various sections together and comparing them with the sections under which Rules were to be made, and under which Rules have been made. But, recurring to the 4th section, it is noticeable that the Official Receiver becomes the provisional liquidator of the company when the winding-up order is made, and he is to continue to act as such until he or another person becomes liquidator and is capable of acting as such. If under the other sections of the Act and under the Rules no other person is appointed by the Court under the 6th section of the Act liquidator in the place of the Official Receiver the Official Receiver remains liquidator.

Now, turning again to the definition clause in the 2nd rule of the Rules of 1890, I see no reason for confining the term, "acting as liquidator," to this meaning—namely, when acting as liquidator otherwise than as provisional liquidator. That being so, it appears to me that I ought to hold, as I do, that the 83rd rule includes the Official Receiver when acting as provisional liquidator.

The settlement of the list of contributories is to be made with all convenient speed, and it is to be made with all convenient speed after the liquidator's appointment. The term "appointment" appears to be not inappropriate to denote the statutory appointment which is made by the Act itself; and it is noticeable

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that the General Orders provide by the form of the winding-up order for a recognition (for that seems to me the proper term) of the fact that the Official Receiver is liquidator of the company, the form of the order being that the Official Receiver attached to this Court be constituted provisional liquidator of the affairs of the company.

Now, I admit that there are many criticisms of a verbal character that may be raised with reference to the term "Official Receiver" which occurs both in the Act of Parliament and in the Rules in many places which give a certain colour to the argument that the term "liquidator" of itself does not include the Official Receiver, and give, again, some colour to the main contention raised in opposition to this application, that the Official Receiver is not intended to be the officer (though acting provisionally as liquidator) upon whom the power to settle the list is cast. But for the reasons which I have shortly given, and which I do not pretend exhaust the subject, I think the true construction is what I have stated; and I think this case itself affords an illustration of the reasonableness of the conclusion at which I have arrived, because it may take (as it has taken in this case) a considerable time before the question whether there is or is not to be some liquidator other than the Official Receiver can be determined.

In this case the company being wound up is the *English Bank of the River Plate*, and it was necessary that there should be a statement of the affairs of the bank prepared before it could be laid before the meetings of creditors and contributories, who were to vote on the question whether there should be some other liquidator; and it took a considerable time (though there has been no delay or waste of time) to make out and prepare that statement of affairs and put it in a proper shape. If then the Official Receiver, when acting as provisional liquidator, cannot settle the list of contributories, there would be in many cases where the winding-up is of a company of magnitude such as this is very considerable delay. The importance of settling the list of contributories is well known, because no call can be made till after it is settled; and there is a tendency for the assets of a company which remain to be called up from the contributories to

disappear where there is delay in settling the list and making the calls.

Another reason that occurs to me is this: the Official Receiver is a person in whom unquestionably very considerable powers are vested, and I see no reason to think that those who framed these Rules would treat him as a person not competent to settle the list of contributories, which, to a considerable extent, is a mechanical operation. He seems to me, *primâ facie*, to be at least as competent a person as any liquidator that might be proposed to the Court for approval by the unanimous resolution of the meetings of creditors and contributories.

I think the broad ground which I have mentioned (though I do not rest my judgment on that alone) is one of considerable importance; and the result, therefore, is that I hold that the list which he has settled has been rightly settled by him, and I direct the liquidator to proceed accordingly.

Solicitors: *Freshfields & Williams; Murray, Hutchins, & Stirling.*

G. M.

NORTH, J.

1891
June 16, 17.
1892
Jan. 20

HAMILTON v. HAMILTON.

[1890 A. 2026.]

Settlement—Infant—Election—Married Woman—Restraint on Anticipation.

An ante-nuptial settlement was made in 1879, the wife being under age. The settlement contained a covenant by the husband and wife to settle her after-acquired property. She was, among other benefits, given certain life interests without power of anticipation. She was divorced. She brought an action to avoid the covenant. Before trial, she married again:—

Declared, that if she elected to avoid the covenant, her interests in other property under the settlement, and also in a house settled by a deed of even date recited in the settlement, ought to be impounded to compensate those who lost by her election; but that the declaration was not to apply during the existing coverture to the income she was restrained from anticipating.

THIS action was commenced by *Mary Theresa Langel*, then *Mary Theresa Hamilton*, the divorced wife of *Julius Laurence Hamilton*, the first Defendant on the record. Her present husband, *Armand Langel*, has since been joined as co-Plaintiff. The other Defendants were the present trustees of a settlement dated the 22nd of May, 1879, made in contemplation of a marriage which took place on the 26th of May, 1879, between the Defendant *Julius Laurence Hamilton*, and the Plaintiff *Mary Theresa Langel*, then *Mary Theresa Jessel*, and the two infant children of the marriage.

At the date of the settlement the Plaintiff *Mary Theresa Langel* was nineteen years of age, and the sanction of the Chancery Division of the High Court was not obtained to the settlement in accordance with the provisions of the *Infants' Settlement Act*. She attained twenty-one on the 12th of July, 1880.

The claim was for a declaration that a covenant to settle her property contained in the settlement was inoperative, and that she was not bound thereby, and for other relief not material to this report.

On the 2nd of December, 1889, a decree nisi was pronounced in a suit by the husband for the dissolution of the marriage

between the Defendant *Julius Laurence Hamilton* and the Plaintiff *Mary Theresa Hamilton*. The writ in this action was issued on the 6th of June, 1890. The divorce was made absolute on the 10th of June, 1890. The Defendant *Julius Laurence Hamilton* delivered a statement of defence on the 12th of August, 1890. The marriage between the Plaintiffs took place on the 14th of October, 1890.

By the settlement and an appointment of even date, made in consideration of the intended marriage, an absolute life interest was given to the intended wife in case she should survive her intended husband, in property brought into settlement by him, and an immediate life interest in furniture assigned by him to the trustees of the settlement. The settlement also comprised other property brought into settlement by the intended husband and his family called in the settlement "the settled husband's property." It also comprised a sum of £5000 given by the wife's mother, and contained joint and several covenants by the intended husband and wife to settle the wife's present as well as her after-acquired property. The £5000 and the property intended to be subject to these covenants were called in the settlement "the settled wife's property."

The first trusts of the income of the settled wife's property were to pay the income to her during the joint lives of the intended husband and wife for her separate use without power of anticipation. The income of the settled husband's property was to be paid after the death of the husband, in case she survived him, to the wife for her separate use for life without power of anticipation during any coverture. The provisions of the settlement are given more in detail in the judgment.

The Defendant, *Julius Laurence Hamilton*, by his statement of defence, pleaded that the Plaintiff since she came of age had confirmed the covenant to settle her property.

By his statement of defence, the Defendant, *Julius Laurence Hamilton*, submitted that if the covenant of the Plaintiff, *Mary Theresa Langel*, were declared inoperative as to any of her property her interest in the trust funds ought to be impounded for the purpose of compensating the parties other than herself, who, if the covenant were binding, would under the provisions of the settlement, be interested in such property.

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Napier Higgins, Q.C., and *Butcher*, for the Plaintiff:—

The covenant to settle the wife's property is voidable; she is put to her election to take under or against the settlement, but she can only be compelled to give up the property on which there is no restraint on anticipation: *Codrington* v. *Codrington* (1); *In re Vardon's Trusts* (2). The restraint returned on her second marriage.

In *Smith* v. *Lucas* (3), the late Master of the Rolls doubted whether a wife was put to her election at all.

D. L. Alexander (*Cozens-Hardy*, Q.C., with him), for the Defendants:—

The Plaintiff, *Mary Theresa Langel*, is put to her election to confirm or avoid the settlement of her property, so far as it has not yet been confirmed. If she elect to take against the settlement, she must give up the benefit she takes under the settlement *pro tanto* to compensate those who suffer loss by reason of part of the settlement being avoided: *Codrington* v. *Codrington*.

Her election will relate back to the time at which she asserted her right by issuing the writ; at that time she was discovert, and the restraint on anticipation was not binding. The whole of the interest she takes under the settlement is liable to be impounded to make compensation for the interests defeated by her electing to avoid the settlement: *Carter* v. *Silber* (4).

With respect to the income of the "settled wife's property," the restraint in words attaches during the joint lives of husband and wife. What was contemplated must have been "during the intended marriage." The Court will read the settlement as if the restraint had been with regard to that property during the first marriage only.

Rashleigh, for the trustees.

Napier Higgins, in reply:—

The settlement must be read literally; it cannot be construed by the light of subsequent events.

(1) Law Rep. 7 H. L. 854.
(2) 31 Ch. D. 275.
(3) 18 Ch. D. 531.
(4) [1891] 3 Ch. 553.

NORTH, J., decided that certain parts of the property subject to the covenant by the husband and wife having been reduced into possession by the husband were subject to the settlement, and that the Plaintiff, *Mary Theresa Langel*, had confirmed the settlement as to some funds which came to her for her separate use; and reserved judgment on the question whether, if she elected to take against the settlement, her other interests ought to be impounded to any, and what, extent.

1892. Jan. 20. NORTH, J. (after stating the effect of his judgment at the trial, continued):—

But then it is said that if the Plaintiff, Mrs. *Langel*, elects to avoid the settlement as to these funds, she is bound to give up any other interest she takes under the settlement, so far as is necessary to compensate the other beneficiaries for what they lose by her election; and the case of *Codrington* v. *Codrington* (1) is relied on as an authority to that effect. The principle of the doctrine of election is now well settled. It rests upon the presumption of a general intention in the authors of an instrument that effect shall be given to every part of it. The result of the authorities down to his time is summed up by Mr. *Swanston* in his learned note to *Gretton* v. *Haward* (2); approved of in the House of Lords in *Ker* v. *Wauchope* (3). That learned author states that the authorities establish two propositions: (1.) That in the event of election to take against an instrument, Courts of Equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints; (2.) that the surplus, after compensation, is restored to the donee, the purpose being satisfied for which the Court controlled the legal right. In *Codrington* v. *Codrington*, a case in many of its circumstances resembling the present, a lady while an infant married without a settlement. After she attained twenty-one, a post-nuptial settlement was made, to which she, her husband, and father were parties, by which certain properties belonging to her husband and father, and a sum of sicca rupees to which she was absolutely entitled

(1) Law Rep. 7 H. L. 854. (2) 1 Swans. 409, p. 441, note.
(3) 1 Bli. 25.

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in reversion, subject to the life estate of her father and mother, were settled upon trusts under which the wife took a first life interest in part of the settled property for her separate use without power of anticipation, and a life interest in the whole if she survived her husband. The marriage was subsequently dissolved at the husband's suit; after that, the lady's parents having died, her reversion fell into possession. The trustees of the settlement claimed the fund; the husband and children supported that view, but the lady resisted, claiming that the fund was not subject to the settlement. The wife succeeded; but it was held that on electing to take against the settlement, the income to which she would otherwise have been entitled under it must be applied to compensate those disappointed by her election. The settlement in that case was void against her, and not voidable only; and it must be noticed that she had not married again.

But the principle of election to which I have referred is not a rule without exception. The same learned author, Mr. *Swanston*, in his note on the subject to *Dillon* v. *Parker* (1), says: "The rule of not claiming by one part of an instrument in contradiction to another, has exceptions; and the ground of exception seems to be, a particular intention, denoted by the instrument, different from that general intention, the presumption of which is the foundation of the doctrine of election." In *In re Vardon's Trusts* (2), a settlement had been made on the marriage of an infant by which both the husband and the wife's father brought property into settlement; part of that contributed by the father being so limited that the wife took the first life interest for her separate use without power of anticipation. It also contained a covenant by husband and wife to settle the after-acquired property of the wife. Subsequently the wife did acquire property, with respect to which she elected not to be bound by the settlement, and thereupon the question arose whether the income settled to her separate use without power of anticipation could be impounded by way of compensation. The Court quoted with approval the passage from Mr. *Swanston* I last read, and held that she could not be compelled to, and could not, give up her interest

(1) 1 Swans. 359, at p. 404, note. (2) 31 Ch. D. 275.

in order to give effect to a presumed general intention of the authors of the trust, when by the same instrument the same persons had expressly provided that she should not have any power of disposing of such interest.

Under these circumstances, in order to see how far the law as to election is applicable in the present case, it is necessary to consider very carefully the long and elaborate settlement of 1879. By a deed of even date with the principal settlement, and made in consideration of the intended marriage, Mr. *Hamilton* appointed that the net rent of a certain house in *Gloucester Terrace*, after paying outgoings, should, if he died before the lady, be paid after his death to her for her life. By the principal settlement Mr. *Hamilton*, in pursuance of a power of appointment under his father's will, appointed that the whole income of two sums of money, amounting altogether to £18,000, should, if the lady survived him, be paid to her for her life. He also assigned to trustees all his shares and interests under his parents' settlement, and all the furniture and effects in the house in *Gloucester Terrace*. The trusts as to the furniture were to permit the lady, from the date of the marriage, to have the use of it for her life, and after her death to hold it for the use of Mr. *Hamilton* absolutely. That gentleman also covenanted that any furniture and other things which should at any time during their joint lives be put, by way of addition or substitution, into the house in question should be held upon the same trusts. None of these interests so given to the wife were expressed to be for her separate use. The settlement then proceeded to declare trusts of the share under his parents' settlement brought into settlement by Mr. *Hamilton*, and of £10,000 brought into settlement by his mother and the investments thereof (therein called "the settled husband's property"). These trusts, so far as material, were to pay the income to Mr. *Hamilton* for life until bankruptcy or alienation, giving him what is called a protected life interest, and after determination of such interest in his lifetime on trusts during the rest of his life for the benefit of him and his wife and his children by the intended or any future marriage: and after his death to pay the income to the lady for her life for her separate use without

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power of anticipation during any coverture, but with a proviso that if the lady should marry again after the death of Mr. *Hamilton*, leaving issue of the intended marriage then living, the trustees should apply the income of £10,000 of the husband's settled property for the benefit of such issue while living. The settlement then declared trusts of £5000, contributed by the lady's father, and the investments thereof (thereinafter called "the settled wife's property") to pay the income thereof, during the joint lives of Mr. *Hamilton* and the lady, to her for her separate use without power of anticipation, and after the death of either to her for life if she survived, not saying to her separate use: but if he survived, then to him for a protected life interest, with a discretionary trust for him and his issue by any marriage, with a secured provision for the children of the intended marriage as before. Then followed trusts for the children of the intended marriage as Mr. *Hamilton* and the lady should at any time jointly appoint, and in default as the survivor should appoint, with remainder to the children of the marriage who should attain twenty-one or, if females, marry, in equal shares, with a power of advancement exercisable by the trustees; but during the joint lives of the husband and wife with their, his, or her consent. The settlement then proceeded to declare trusts of the settled husband's and wife's properties in default of any child attaining a vested interest, but such trusts were declared to take effect only after the death of the survivor of the husband and wife, the funds reverting to the wife not being given for her separate use. The settlement then provided that if Mr. *Hamilton* survived the lady and married again he might make a settlement of his settled property, to a limited extent, on a future wife and their children, and, in like manner, that if the lady survived Mr. *Hamilton* and married again she might make a settlement of her separate property, to a limited extent, on an after taken husband and their children. And, lastly, the settlement contained joint and several covenants by Mr. *Hamilton* and the lady that if the intended marriage took effect, and if at any time or times during their joint lives any real or personal estate whatsoever exceeding £200 in value (with certain exceptions therein stated, and not now material) should be bequeathed, or

descend, or devolve upon or vest in the lady or any persons in trust for her, or to or in Mr. *Hamilton* in her right, the same should be conveyed or assigned to the trustees upon trust to get in and convert and invest the same, with the consent of the husband and wife during their joint lives, and afterwards of the survivor, and hold such property—to put it shortly—upon the trusts already declared of the settled wife's property; followed by a special provision applying those covenants to any property to which the lady was entitled in possession, remainder, or reversion at the date of the settlement.

It is contended on behalf of Mr. *Hamilton* and his children that the lady has by bringing this action elected to take against the settlement; and that, therefore, she is bound (though of course only to the extent necessary to compensate the persons defeated by her election) to give up everything to which she is entitled under the settlement; to which her counsel reply that having regard to *In re Vardon's Trusts* (1), she is not bound to, and cannot, give up any interest limited to her for her separate use without power of anticipation. The argument against her was put on two grounds, which must be dealt with separately.

One ground is this—It is said that at present there is not any property settled upon the lady by her marriage settlement which she is restrained from anticipating, for the restraint imposed by the settlement merely applies to the marriage then intended, which has been determined by the divorce. In other words, I am asked to read the phrase, often repeated in the settlement, of "during their joint lives" as though the phrase had been "during the intended coverture." This contention is clearly unfounded so far as relates to the lady's interest in remainder in Mr. *Hamilton's* settled property; for, as to that, she is expressly restrained during any coverture: and, in my opinion, it is not well founded in any respect. I was told that the same phrase was used in the covenants to settle after-acquired property; and that as it was settled by decision that these covenants had come to an end upon the dissolution of the marriage, I must put the same meaning upon those words throughout the settlement. But I cannot assent to this argument. It is quite true that the

(1) 31 Ch. D. 275.

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husband's covenant has to some extent ceased to be effective, because the dissolution of the marriage has rendered him incapable of reducing into possession any personal property of the lady. It is true also that the lady will not be bound by her covenant, if she can avoid the settlement altogether. But as a matter of construction, if she cannot, or elects not to, avoid the settlement, I am of opinion that the covenant as to after-acquired property did not come to an end upon the dissolution unless the phrase "during their joint lives" is to be diverted from its natural meaning in the settlement. That phrase is unambiguous in itself, and is frequently emphasized by being contrasted with a limitation to the survivor, after the death of either of the parties. That being so I am precluded by the decision of the Court of Appeal in *In re Tredwell* (1) from giving to those words any other than their natural meaning. Indeed, there are many instances in which to read the words as equivalent to "during the intended coverture" would be obviously introducing results not intended by the parties. Under the settlement the lady takes the first life interest in the settled wife's property, but the adoption of the construction contended for would make her interest determine on the dissolution, and make the income of the £5000 brought into settlement by her father result to him during the rest of her life. Again, there is a power of advancement to the children during the joint lives of the parents if the latter join to consent. That case may arise, though at present it seems unlikely, and I cannot see why the children should be deprived of that possible benefit by their mother's misconduct. So, again, if the lady elects not to avoid the settlement, both Mr. *Hamilton* and the children may derive some benefit under the covenant to settle after-acquired property. Other instances might be given from the settlement, but it is not necessary. The parties are bound by the contract made, and the rights of none of them are altered by the dissolution: see *Fitzgerald* v. *Chapman* (2); *Burton* v. *Sturgeon* (3). The provisions of the settlement might possibly have been different if the parties had anticipated the events which have happened, but no power to modify the settlement or any of its provisions can now

(1) [1891] 2 Ch. 640. (2) 1 Ch. D. 563. (3) 2 Ch. D. 318.

be exercised by me. I must deal with the document as I find it. I therefore hold that if the lady elects to take against the settlement, she is not bound to, and indeed cannot, give up during her present coverture any interest under the settlement which she is thereby restrained from anticipating during the joint lives of herself and Mr. *Hamilton*. But there are certain interests which she takes as to which she is not restrained, and those she is, in my opinion, bound to give up if she elects to avoid the settlement.

The other ground taken up on behalf of Mr. *Hamilton* and his children is this. It is clear that a restraint on anticipation is binding only during actual coverture, and, therefore, although the lady may now be unable to anticipate during her present coverture, she undoubtedly had the power of binding her life interest by anticipation at any time during the interval between the dissolution of her first and the celebration of her second marriage. The argument is that she did so by bringing this action, for that she thereby elected to avoid the settlement, and by so electing engaged or contracted to do all that the law would exact in consequence of such avoidance; and that as she was a single woman when she commenced this action, and was competent to bind by anticipation all her future income notwithstanding restraint, it is bound accordingly, and can be sequestrated against her, by reason of the contract or engagement made before her second marriage, though since such marriage she has not been competent to make any such contract or engagement; and it is said that in *Codrington* v. *Codrington* (1) and in *Carter* v. *Silber* (2) the parties electing to take against an instrument were held bound not only from the date of the decree but from the date when the repudiation took effect. In my opinion this argument is not well founded. It arises from the confusion of two things essentially different, viz., the actual date of the election to repudiate and the date as from which the repudiation operates. In *Carter* v. *Silber* the formal repudiation was made shortly before action, but it was held to relate back to the death of a parent more than a year earlier. In *Codrington* v. *Codrington* the plaintiff's claim to repudiate was made by the writ in the action, but it was held both in the Court of Appeal and in the

(1) Law Rep. 7 H. L. 854. (2) [1891] 3 Ch. 553.

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House of Lords that she was still entitled to exercise her right of election, and time was given for that purpose, though it was held that, if she did elect to take against the settlement, she must account for all that she had received under it since the decree *nisi* for dissolution of the marriage. I must follow that case, and hold that the lady did not make any election by bringing the action, but that she is now entitled to elect.

The question as to the date from which such election should have a retrospective effect does not arise in this case, as no claim was made that she should be required to make good any benefit she has received under the settlement since the decree *nisi*. It was, indeed, contended here that the time for the lady to elect, if put to her election, has not yet arrived, but that she is entitled to wait and see when the reversionary interests fall into possession before electing; but that is out of the question. She has raised the point for decision now by bringing this action to trial after the question as to her obligation to elect has been raised by the defence, and she must now elect accordingly. And there is another reason why she must elect at once—viz., that the settlement executed by the lady while an infant is not void, but voidable only, and any avoidance must be within a reasonable time after the decree *nisi*. And although I hold that this action was commenced within a reasonable time, I am of opinion that it would not be reasonable that the time for election should be prolonged further. [His Lordship dealt with the particular sums the subject of his former judgment, and proceeded :—]

Then I must declare that the covenants for the settlement of the lady's property are not operative, and that the lady is not bound thereby, so far as relates to the reversionary interests I have above mentioned (describing them). Then there must be a declaration that the lady is bound (within a time to be named) to signify her election if she will take against the settlement of 1879, so far as relates to those reversionary interests, and a declaration that if she elects to take against the settlement the life and other interests to which she is entitled under that settlement ought to be applied in making compensation to the persons disappointed by such election for the benefits under the settlement of which they have been or will be deprived

by such election, so far as the same will extend, and until such compensation shall be fully made: but this declaration is not to apply to the income of the property described in the indenture of 1879 as the settled husband's property during the continuance of the present coverture of the female Plaintiff, nor to the income of the property described in the same settlement as the settled wife's property during such portion of the present coverture of the female Plaintiff as the Defendant, *Julius Laurence Hamilton*, shall be living, with respect to which income the Court declares that the female Plaintiff is not bound to elect. There must be liberty to apply as to the income of the settled husband's property on the termination of the present coverture of Mrs. *Langel*, and as to the income of the settled wife's property on the determination of the present coverture of Mrs. *Langel*, or the death of *Julius Laurence Hamilton*, whichever event shall first happen. I draw this distinction because the income of the former is given to the lady for her separate use, without power of anticipation, during any coverture, while the income of the latter is so given to her during the joint lives of herself and Mr. *Hamilton* only. This leaves certain property to which this last declaration applies with full force, and without any qualification—namely, the house and furniture, and the income of the £18,000 appointed in reversion to the lady, in exercise of the power of appointment contained in the will of Mr. *Hamilton's* father, which is not appointed to her for her separate use. I include the house, because I am of opinion that her election applies to that also, although it was dealt with by a separate instrument of even date, and not by the settlement itself; because it was settled in pursuance of an agreement on the treaty for and in consideration of the marriage, and is recited in the settlement itself: and both deeds formed part of one transaction and arrangement. I also give liberty to apply to the Judge in Chambers for any directions which may be necessary for working out and giving effect to the declarations hereby made; and also to apply as to any property or funds, other than those specifically dealt with by this judgment, which may or but for the declarations herein contained might come within the covenants as to the lady's property contained in the settlement of 1879, and liberty to apply generally.

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[His Lordship dealt with the costs, and declared that the Plaintiff, Mrs. *Langel*, must signify within a month whether she elected to avoid the covenant.]

Solicitors for Plaintiff: *Mann & Taylor.*

Solicitors for Defendant, *Julius Laurence Hamilton*, and the infants: *Emanuel & Simmonds.*

Solicitor for the trustees: *E. M. Headley.*

D. P.

NORTH, J.
1892
Jan 23.

In re CRYSTAL REEF GOLD MINING COMPANY.

Company—Winding-up Petition—Locus Standi of Petitioner—Contributory—Calls in Arrear.

A petition for the winding up of a company, presented by a shareholder who is in arrear in the payment of calls upon his shares, ought not to be absolutely dismissed; but as a general rule the Court will not hear the petition until the calls have been paid, or, at any rate, paid into Court.

In re Diamond Fuel Company (1) explained.

A petition for the winding up of a company having been presented by two shareholders, who were in arrear in the payment of calls, the Court declined to hear the petition except upon the undertaking of the Petitioners to submit to any order which the Court might think to make as to the payment of the calls.

The undertaking having been given, the petition was heard and was dismissed with costs, and the Court then enforced the undertaking by ordering each Petitioner to pay the calls due upon his shares.

THIS was a petition for the winding up of the company, the Petitioners being two shareholders named *Fenton* and *Oliver*, each of whom had not paid a call which had been made on his shares in July, 1890. The company had obtained judgment in an action against *Fenton* for the amount due from him, but no proceedings had been taken against *Oliver*.

Beddall, for the Petitioners.

Cozens-Hardy, Q.C., and *Warrington*, for the company:—

The Petitioners, not having paid the calls on their shares, cannot be heard to ask for a winding-up—at any rate, until they

(1) 13 Ch. D. 400.

have paid the amount due from them into Court: *In re European Life Assurance Society* (1); *In re Steam Stoker Company* (2); *In re Diamond Fuel Company* (3). They have not offered to do this.

Beddall, for the Petitioners:—

In *In re European Life Assurance Society*, Vice-Chancellor *James* dismissed a winding-up petition presented by a shareholder, on the ground that the petitioner was in arrear of payment of calls, and this decision was followed by Vice-Chancellor *Bacon* in *In re Steam Stoker Company*. But in *In re Diamond Fuel Company*, in which a similar objection was taken, the Court of Appeal overruled it, and Lord Justice *James* said (4): "I think that in *In re European Life Assurance Society* I was rather supplementing the Act than interpreting it."

The Act gives an unqualified right to a contributory to petition for a winding-up. The directors might make a call in order to prevent a shareholder from petitioning.

C. E. E. Jenkins, for contributories supporting the petition.

NORTH, J.:—

I do not think the decision of the Court of Appeal in *In re Diamond Fuel Company* goes so far as Mr. *Beddall* has contended that it does. In *In re European Life Assurance Society*, Vice-Chancellor *James*, in the first instance, expressed his intention not to hear the petition until the calls due by the petitioner should have been paid. The counsel for the company thereupon asked that the petition might not be kept hanging over their heads, and the learned Judge then departed from his original intention, and made an order dismissing the petition at once, and he thus deprived the petitioner of any opportunity of paying his calls. It was with reference to that ultimate decision that the learned Judge, on a subsequent occasion in the Court of Appeal, made the observations on which Mr. *Beddall* has relied. If I may say so with all respect, I cannot see any reason why a

(1) Law Rep. 10 Eq. 403.
(2) Ibid. 19 Eq. 416.
(3) 13 Ch. D. 400
(4) Ibid. 406.

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winding-up petition, presented by a shareholder who is in arrear in the payment of calls, should be absolutely dismissed at once, even though the petitioner has the money in his pocket and is ready to pay it into Court. That such a petition ought not, as a matter of course, to be at once dismissed, is all that was decided in *In re Diamond Fuel Company* (1). As a general rule, I think that the Court ought not to hear the petition until the calls have been paid, or, at any rate, until the amount has been paid into Court; but I agree with Mr. *Beddall* that there might be circumstances under which the Court ought not to require this to be done. I will hear the present petition only upon the Petitioners giving an undertaking that they will submit to any order which the Court may think fit to make as to the payment of the calls in arrear.

Cozens-Hardy, for the company:—

The judgment against *Fenton* is a better security for the payment of his calls than his undertaking would be.

NORTH, J.:—If the undertaking is given, I should, if I made a winding-up order, require the calls to be paid before the drawing up of the order.

Beddall, for the Petitioners, gave the undertaking. He was then heard upon the merits.

Cozens-Hardy, Q.C., and *Warrington*, for the company, were not heard.

NORTH, J.:—

I consider this petition an abuse of the power of presenting a winding-up petition. There are two Petitioners, *Fenton* and *Oliver*, and they are both largely in arrear in respect of calls upon their shares. The company have obtained a judgment for more than £3000 against *Fenton*. No action has as yet been taken against *Oliver*, and it is suggested that this is because he is a mere clerk. I think it is very likely that is the reason. The result is, there is a judgment for £3000 against *Fenton*, and either he cannot be found or the money cannot be got out of him.

(1) 13 Ch. D. 400.

It was objected that he ought not under the circumstances to be allowed to be heard by his counsel to open this petition, and I have considerable doubt now whether I ought to have heard him. But I thought it possible that there might be some ground which would justify a winding-up order, and, therefore, I allowed the Petitioners' counsel to state the case upon an undertaking by the Petitioners to submit to any order which the Court might think fit to make as to the payment of the sums due from the Petitioners respectively for calls.

After hearing the evidence, I have come to the conclusion that the petition ought to be dismissed with costs. It fails absolutely and entirely, and I consider that the presentation of such a petition on such materials is a mere wanton, idle waste of time and expense.

Some months ago, another petition was presented by *Fenton*: it was dismissed with costs, and those costs have not yet been paid; and very possibly the costs of the present petition may not be paid. I will do my best to prevent any further such wanton litigation by these parties by making an order in pursuance of the undertaking which was given. I shall order *Fenton* to pay to the company within a week from this date the amount for which judgment has been recovered against him. I do not think it necessary to make such an order against *Oliver*. It is not very important, and I do not think I have the materials necessary to enable me to say what is due from him.

Cozens-Hardy:—An order would save the expense of other proceedings against *Oliver*. He is the registered holder of 1610 shares, and there is a call of 5*s*. per share due from him, which amounts to £402 10*s*. The call was made in July, 1890. The company, I submit, are entitled on his undertaking to an order for that amount. Judgments have been obtained against all the other shareholders who are in arrear.

According to the articles of association, the sum bears 4 per cent. interest.

NORTH, J.:—I will, on that footing, make an order that *Oliver* do within a week pay to the company the sum of £402 10*s*., with

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interest at 4 per cent. from the date appointed for payment of the call down to to-day. The Registrar will insert the figures in the order.

Solicitors: *Chinery, Aldridge, & Co.; J. R. Bourne.*

W. L. C.

NORTH, J.
1892
Feb. 13.

In re SPARROW'S SETTLED ESTATE.

[1892 S. 039.]

Settled Estate—Contract for Sale—Sanction of Court—Infant—Settled Estates Act, 1877 (40 & 41 *Vict. c.* 18), s. 16 [*Revised Ed. Statutes, vol. xviii., p.* 335]—*Conveyancing and Law of Property Act,* 1881 (44 & 45 *Vict. c.* 41), s. 41.

A testator devised real estate to trustees in fee, upon trust "to receive the rents and annual proceeds (including mining royalties, if any) arising from the same, and to invest the same until my son *Cyril* shall attain twenty-four, or die leaving issue, whichever event shall first happen; and thereupon I declare that my trustees shall stand possessed thereof, and of the rents and proceeds received by them as aforesaid, in trust for the said *Cyril* absolutely and beneficially." And the testator devised and bequeathed to his trustees the residue of his real and personal estate, upon trust to sell and convert the same into money and to pay and divide the same equally between such of his sons, *Isaac, William,* and *Cyril,* as should attain twenty-four, or die under that age leaving issue; and if there should be only one such son, then upon trust for such one son absolutely and beneficially. The will did not contain any power of sale of specifically devised real estate. The son *Isaac* had attained twenty-one; the sons *William* and *Cyril* were both under twenty-one:—

Held, on the authority of *Liddell* v. *Liddell* (1), that, by virtue of sect. 41 of the *Conveyancing Act,* 1881, the estate devised on trust for the son *Cyril* was a "settled estate," within the *Settled Estates Act,* 1877; and that consequently the Court had under the latter Act jurisdiction to sanction a sale of the estate.

PETITION, intituled in the matter of the *Settled Estates Act,* 1877, asking the Court to sanction an agreement for the sale of certain real estate, which was devised by the will of *J. W. Sparrow,* who died on the 4th of June, 1891.

The testator by his will, dated the 19th of March, 1890, devised all his real estate unto and to the use of his wife *Mary Sparrow, H. F. Baxter,* and *Richard Williams,* their heirs and

(1) 31 W. R. 238; 52 L. J. (Ch.) 207.

assigns, upon the trusts thereinafter declared. As to certain specified lands, and a mining property known as the *Jacob's Hall* property, the trusts declared were "to receive the rents and annual proceeds (including mining royalties, if any) arising from the same, and to invest the same until my son, *Cyril E. Sparrow*, shall attain the age of twenty-four years, or die leaving issue, whichever event shall first happen; and thereupon I declare that my trustees shall stand possessed thereof and of the said rents and proceeds received by them as aforesaid, together with all accumulations, and the securities for the time being representing the same, upon trust for my said son *Cyril E. Sparrow*, absolutely and beneficially." And, after declaring other trusts of other parts of his estate, the testator declared that his said trustees should hold the rest, residue, and remainder of his real and personal estate upon trust to sell and convert the same into money. and to pay and divide the same to and equally between such of his sons, *Isaac S. Sparrow*, *William H. Sparrow*, and *Cyril E. Sparrow*, as should attain the age of twenty-four years, or die under that age leaving issue; and if there should be only one such son, then upon trust for such one son absolutely and beneficially.

The will did not contain any power to sell any of the real estate of the testator devised upon specific trusts.

John E. Sparrow was the testator's eldest son and heir-at-law.

At the time when this petition was presented, *Isaac S. Sparrow* was aged twenty-one, *William H. Sparrow* nineteen, and *Cyril E. Sparrow* thirteen.

The petition was presented by the three trustees of the will; *Isaac S. Sparrow*; *William H. Sparrow*, and *Cyril E. Sparrow*, by their mother as their next friend; and *John E. Sparrow*.

The petition asked the Court to sanction a conditional contract into which the trustees had entered for the sale of the *Jacob's Hall* property to *W. B. Harrison* for £1850.

Cozens-Hardy, Q.C., and *A. Underhill*, for the Petitioners:—

By virtue of sect. 41 of the *Conveyancing Act*, 1881 (1), this

(1) Sect. 41: "Where a person in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the *Settled Estates Act*, 1877."

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estate is a "settled estate" within the *Settled Estates Act*, 1877, and therefore the Court has jurisdiction to entertain the petition.

Though the infant son *Cyril* is only contingently "seized of or entitled to" the property, that is sufficient to bring the case within sect. 41: *Liddell* v. *Liddell* (1).

[NORTH, J.:—I think the report of that case in the *Weekly Reporter* must be incorrect in stating that two only of the testator's children were infants. I think they must all have been infants (2).]

Probably that was so. But at any rate the case is an authority for so construing sect. 41.

NORTH, J.:—

I think that *Liddell* v. *Liddell* is precisely in point, and I must follow it. It shews that the estate devised on trust for the testator's son *Cyril* is a "settled estate," and consequently I have jurisdiction to entertain the petition.

The petition was then heard on the evidence, and Mr. Justice *North* sanctioned the contract for sale.

Solicitor: *Seaton Taylor.*

(1) 31 W. R. 238; 52 L. J. (Ch.) 207.

(2) By the courtesy of Messrs. *Rollit & Sons*, the solicitors for the Petitioners in *Liddell* v. *Liddell*, the reporter has had an opportunity of seeing a copy of the petition in that case, and has ascertained that the testator, *G. W. M. Liddell*, left only four children surviving him, a son and three daughters, and that the petition was presented by those four children, all of whom were then infants. The report of the case in 52 L. J. (Ch.) agrees with this.

W. L. C.

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1891
Dec. 15.

CUMBERLAND UNION BANKING COMPANY *v.* MARYPORT HEMATITE IRON AND STEEL COMPANY.

[1891 C. 844.]

In re MARYPORT HEMATITE IRON AND STEEL COMPANY.

Mortgagor and Mortgagee—Fixtures—Trade Machinery—Contract for Erection of Machinery to be paid for by Instalments—Machinery to remain Property of Vendors till fully paid for—Prior Mortgage of Premises including Machinery thereafter erected—Failure of Mortgagor to pay Instalments of Purchase-money—Right of Vendor to remove Machinery.

A limited company, who were lessees of a colliery, on the 29th of December, 1883, mortgaged it to their bankers, "together with all fixed engines, boilers, shafting, gearing, machinery, machines, and other fixtures . . . now standing and being, or hereafter to stand or be," upon the mortgaged premises.

On the 2nd of July, 1889, the company entered into an agreement with some engine-makers for the erection by them at the colliery of a machine. The purchase-money was to be paid by monthly instalments, commencing at a specified date, and it was provided that, if the payments were not made regularly, the vendors should have the right at once to call upon the company for immediate payment in full of the whole of the balance of the purchase-money then remaining due. It was also stipulated that, immediately on the vendors receiving payment of the balance, the machine should become the property of the company, but that until fully paid for it should remain the property of the vendors. The machine was erected accordingly, and it commenced working in August, 1890. It was of the nature of a trade fixture. Two instalments of the purchase-money were paid by the company, but they failed to make any further payments.

In February, 1891, the bankers brought an action to enforce their security, and a receiver was appointed, who took possession of the colliery. In March, 1891, the company resolved on a voluntary winding-up, and a supervision order was made in May:—

Held, that the stipulation that the machine should remain the property of the vendors until it was fully paid for was valid, and that, notwithstanding the inclusion in the mortgage deed of machinery to be after erected, the company could not confer on their mortgagees a better title to the machine than they had themselves:

Held, consequently, that, the receiver desiring to give up possession of the colliery, the vendors were entitled to remove the machine.

Semble, that no property in tenant's fixtures vests in the landlord before the termination of the tenant's term.

MOTION by a company, called the *Luhrig Coal and Ore Dressing Appliances, Limited*, asking that the Applicants might

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be at liberty to remove from a colliery, known as the *Ellenborough Colliery*, which was in the possession of a receiver appointed in the action, certain plant, called a coal-washing and dry separation machine, which the Applicants alleged to be their property, and that the receiver might be ordered to deliver up possession of the said plant to the Applicants accordingly.

The action was commenced on the 28th of February, 1891, for the purpose of realizing by foreclosure or sale some mortgages and some debentures which the Defendants had given to the Plaintiffs to secure moneys due by the Defendants to the Plaintiffs.

The *Ellenborough Colliery* was by a lease, dated the 31st of December, 1879, demised to *J. Gilmour*, *G. Anderson*, *J. Wood*, and *A. Gilmour* (who then carried on business in partnership under the firm of the *Maryport Hematite Iron Company*), for a term of fifty years from the 1st of October, 1878, determinable by the lessees as therein mentioned, at the yearly certain rent of £800, and the further rents and royalties therein mentioned, and subject to certain covenants and conditions by the lessees to be observed and performed.

Before the date of the mortgage deed next hereinafter stated the business and assets of the lessees (including the lease of the *Ellenborough Colliery*) had become vested in the Defendant company.

By a deed dated the 29th of December, 1883, the *Ellenborough Colliery* was (with other property of the Defendant company) assigned by them to the Plaintiffs by way of mortgage to secure moneys due by the Defendants to the Plaintiffs.

The parcels of this deed (so far as is material for the present purpose) were as follows:—

"Fourthly, all the colliery, mines, hereditaments, and premises demised by the hereinbefore recited indenture of the 31st of December, 1879, or now subject to the operation thereof; and fifthly, all the brickworks, hereditaments, and premises hereinbefore described as the brickworks held of *Harris*, and the full benefit of the agreement under which the same are held, as hereinbefore recited; together with all iron and steel manufactories, blast and other furnaces, rolling and other mills,

reservoirs, aqueducts, tanks, railings, tramways, warehouse, offices, dwelling-houses, erections and buildings, and all fixed engines, boilers, shafting, gearing, machinery, machines, and other fixtures, tools, implements, and chattels, now standing and being, or hereafter to stand or be, upon the said premises or any part thereof. To have and to hold the said premises (subject to a prior security) unto the said banking company, as to all the premises (except such as come within the definition of personal chattels in the *Bills of Sale Act*, 1878), for all the residue of the respective terms and tenancies for which the said premises hereinbefore, firstly, secondly, thirdly, fourthly, and fifthly described, and the fixtures therein, are respectively held under the leases and agreement relating thereto as hereinbefore recited (except the last day of each of the terms for which the same are respectively held as aforesaid), and as to such (if any) of the premises as come within the definition of personal chattels in the *Bills of Sale Act*, 1878, unto the said banking company absolutely," subject as to all the premises to the proviso for redemption thereinafter contained.

On the 2nd of July, 1889, an agreement was entered into between the *Maryport Company* (called the first party) of the one part, and a firm of *Simon & Luhrig* (called the second party) of the other part, "respecting a coal-washing plant, together with dry separation and loading arrangements, to be erected at the *Ellenborough Colliery*, of a capacity of 500 tons per day of eight hours."

This agreement contained (*inter alia*) the following stipulations:—

"(1.) The first party hereto order a coal-washing plant from the second party, and the second party agree to supply the machinery in accordance with the specification and preliminary plans dated the 21st of June, 1889, and start the plant to work, under the conditions and terms of payment hereinafter specified, for the sum of £3750.

"Besides supplying the machinery as specified for the above sum, the second party agree to disburse £1000 temporarily towards the cost of buildings and hoppers, and the first party

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agree to repay those two sums, together with any others specified hereinafter, on the following terms:—

"There is four months to be given from the 1st of August, 1889, for the erection of buildings, and a further four months for erecting the machinery, when the following payments commence, to be made monthly. Payments will begin to accrue from and after the 1st of April, 1890, the first payment being due for the previous month's raisings on the 26th of May, 1890, and each following monthly payment is to fall due on the 26th of each month for the previous month's raisings until the full amount is paid.

"During the first twelve months after starting the plant to work the payments are to be made at the rate of 3*d.* per ton of coal treated, and during the second twelve months after the starting the plant to work, and until the whole amount shall be fully paid, payments to be made at the rate of 4*d.* per ton of coal treated.

"These payments are to be calculated upon a minimum quantity of 350 tons of coal per day of eight hours, whether treated or not, and are not to be affected by strikes, stoppages, &c.

"The second party undertake the general supervision of erection of buildings for 5 per cent. on total amount of outlay for buildings and hoppers, without, however, incurring any responsibility for accidents, such as giving way of foundations, &c., they simply acting to the best of their knowledge.

"Whenever the buildings are completed a statement of the entire cost will be prepared by the first party, and certified by the second party, when a cheque for £1000 will be paid by the second party.

"It is expressly understood that, should the payments before specified not be rendered regularly by the first party to the second party, the second party shall have the right to at once call upon the first party for immediate payment in full of the whole of the rest of the amount due at that time.

"The first party also agree to pay to the second party 5 per cent. interest on all sums owing to the second party by the first party, after each payment made.

"It is hereby expressly understood that immediately on the

second party receiving payment of the balance, the plant becomes the full and undisputed property of the first party, without any further claims for royalty or otherwise from the second party, but that until fully paid for the plant remains the property of the second party.

"(2.) The first party agree to erect the necessary buildings complete to the plans of the second party, and to supply all driving-belts, and all timber and small ironwork required for making shoots, hoppers, boxes, tanks, connections, &c., or for erection. Further, to supply engine-power and water, and to alter railway sidings as required, and it is understood that any work in connection with the washers which has to be performed by the first party will have to be completed at latest by the 1st of February, 1890.

"(3.) The delivery and erection of the plant by the second party as specified to commence on the 1st of December, 1889, and the erection of the plant to be completed on the 1st of April, 1890, provided that the building, hoppers, tanks, &c., are sufficiently completed by the first party to receive the machinery and allow of its erection. The first party to finish erection of engine-power, water-supply, railway sidings, platforms, and gangways, which are required for bringing the coal from the pit's mouth to the washing establishment, by the 1st of February, 1890."

On the 23rd of July, 1890, *Simon & Luhrig* entered into an agreement for the sale of their business and assets (including the benefit of the contract of the 2nd of July, 1889), to a company called the *Luhrig Coal and Ore Dressing Appliances, Limited.*

The erection of the washing plant was commenced by *Simon & Luhrig*, and was continued and completed by the *Luhrig Company.* The working was started in August, 1890, the time for completion having been extended by agreement.

Two sums of £113 15*s.* each were paid by the *Maryport Company* to the *Luhrig Company* on account of the moneys due under the agreement of the 2nd of July, 1889; but no further payments were made, and a large sum remained due under the agreement to the *Luhrig Company.* The *Maryport Company* got into difficulties, and on the 14th of March, 1891, they resolved on a

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voluntary liquidation, and on the 12th of May, 1891, an order was made to continue the winding-up under the supervision of the Court. *W. B. Peat* was appointed liquidator. He had, on the 28th of February, 1891, been appointed receiver and manager in the present action, and had entered into possession of the *Ellenborough Colliery*, with the plant and premises, including the washing plant erected by the *Luhrig Company*.

The *Luhrig Company* claimed the washing plant as being their property under the agreement of the 2nd of July, 1889, and the present motion was made for the purpose of enforcing their claim.

Two summonses were heard at the same time as the motion.

The first summons was issued on the 10th of December, 1891, on behalf of the lessor of the *Ellenborough Colliery*. It was intituled in the matter of the *Maryport Company* and in the action, and it asked that the Applicant might be at liberty to distrain on the stocks, stores, plant, and other chattels liable to distress in and about the colliery of the company whereof the Applicant was lessor, for all arrears of rent then due to the Applicant; that the receiver in the action might be ordered to pay the Applicant the half-year's rent due at Michaelmas, 1891, and the costs of the application, except in so far as the same might have been satisfied by distress, after payment of all prior arrears, and to pay over to the Applicant the proceeds of sale of chattels liable to distress which at the date of the summons were in the receiver's hands; and that, in default of payment of all arrears and costs, and in default of sufficient distress being found, the Applicant might be at liberty to enter upon the colliery and to determine the lease thereof. This summons was served on the Plaintiffs and on the liquidator of the *Maryport Company*.

The second summons was issued on the 9th of December, 1891, on behalf of the Plaintiffs in the action. It was intituled in the action only, and it asked (*inter alia*) that the receiver might be at liberty to vacate the premises subject to the lease of the 31st of December, 1879, and also to remove from off the premises all the fixtures, fittings, loose chattels, and all plant belonging to the *Maryport Company*.

This summons was served on the company and the lessor.

An affidavit made by an engineer of the *Luhrig Company* stated the particulars of which the machinery supplied by *Simon & Luhrig* under the agreement consisted, and added that, "Nearly all the machines are fastened to the floor beams of the building, or to timber frames specially provided to support the machinery, by means of bolts which can be easily detached. In a few instances only bed-plates of machines are fixed to the brick structure by means of holding-down bolts, which can also be easily removed. No part of the machinery is imbedded in or built into the fabric of the building, and the whole of the plant supplied under the agreement can be removed without causing any substantial injury to the fabric of the building."

The assistant manager of the Defendant company made an affidavit, in which he said: "The machine is of both fixed and loose parts, all being built into or being under a large brick and iron structure for its protection and support. The actual mechanical parts of the whole would be useless for their technical purpose were they not upheld by the walls, pillars, and flooring of the building. The building in which the washing machine and dry separation plant is contained measures some forty feet in height, eighty feet in length, and forty feet in breadth, being also three stories high, with foundations going in places some twenty-five feet below the ground level, the machinery also being in some places many feet below the surface of the land. In one part especially it is some twenty-five feet below the surface. The machinery is bolted on to the beams, and the beams are built into the walls of the structure. The plant is one whole piece of machinery; the taking away of one part would mean the disablement of the whole."

Vaughan Hawkins, for the *Luhrig Company*:—

The assignment of the trade fixtures and chattels which is contained in the Defendants' mortgage is in the form which was used in *Ex parte Daglish* (1). It ought, therefore, to have been registered under the *Bills of Sale Act*; and, moreover, the mortgage is not in the statutory form of a bill of sale. The

(1) Law Rep. 8 Ch. 1072.

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mortgage is an "assurance of personal chattels" within the meaning of the *Bills of Sale Act*. The things which the *Luhrig Company* claim are partly "personal chattels" within the meaning of the Act, and are partly made personal chattels by reason of the form of the mortgage deed: *Southport and West Lancashire Banking Company* v. *Thompson* (1).

The machinery which the *Luhrig Company* claim is all of the nature of trade or tenant's fixtures—it is fixed by bolts and screws. The claim is limited to that which can be removed from the building without doing any injury.

As between the *Luhrig Company* and the mortgagors (the *Maryport Company*), this machinery is, by the terms of the agreement, the property of the former. The mortgagees can have no better title than the mortgagors themselves had. If the price had been fully paid to the *Luhrig Company*, no doubt the machinery would have been included in the Plaintiffs' security, because it would then have become the property of the *Maryport Company*.

The *Maryport Company* have abandoned their contract with the *Luhrig Company*, and the *Luhrig Company* are entitled to remove the machinery, which is their property. If a mortgagor who is in possession of freehold property which he has mortgaged lets it, the tenant has still a right to remove the tenant's fixtures: *Sanders* v. *Davis* (2); *Watkins* v. *Land Securities Company* (3); Tenant's fixtures are not distrainable by a landlord for rent: *Darby* v. *Harris* (4); *Amos* and *Ferard* on Fixtures (5). In *Mather* v. *Fraser* (6), Vice-Chancellor *Wood* is supposed to have expressed an opinion to the contrary; if he did so, he was mistaken. In *Hellawell* v. *Eastwood* (7) it was held, that machines in a cotton mill, called "mules," which were fixed by means of screws, were distrainable for rent; but the ground of the decision was that the "mules" had not lost the character of movable chattels, and would not have passed by a conveyance or demise of the mill. That does not apply to the present case. In *Holland* v. *Hodgson* (8), it was held that looms fixed by nails

(1) 37 Ch. D. 64.
(2) 15 Q. B. D. 218.
(3) W. N. (1885) 211.
(4) 1 Q. B. 895.
(5) 3rd Ed. p. 390.
(6) 2 K. & J. 536.
(7) 6 Ex. 295.
(8) Law Rep. 7 C. P. 328.

driven into the floor passed by a mortgage of the mill as part of the realty. In *Amos* and *Ferard* on Fixtures (1), a passage from *Gilbert* on Distress is quoted, in which he says, "Whatever is part of the freehold cannot be distrained, for what is part of the freehold cannot be severed from it without detriment to the thing itself in the removal; and consequently that cannot be a pledge that cannot be restored in *statu quo* to the owner."

Here the machinery became part of the freehold the moment it was affixed to it, and though it might be removed without doing more than slight damage, yet it was brought there with the object of rendering the land useful for the trade purposes for which it was demised, and it ceased to be "personal chattels." Consequently, the landlord cannot distrain upon it: *Pitt* v. *Shew* (2).

Cozens-Hardy, Q.C., and *E. Page*, for the bank:—

The *Maryport Company* being a company registered under the *Companies Act*, 1862, it was not necessary that the mortgage should be registered as a bill of sale under the *Bills of Sale Act*: *In re Standard Manufacturing Company* (3). A builder would be entitled to remove bricks which he had placed on the land of another person for the purpose of a contract to build upon it; but, if the bricks had been built into a wall, he would not retain any property in them: *Bellamy* v. *Davey* (4). This machine, so soon as it was fixed, became part of the freehold, subject only to the tenant's right of removal. But that is the right of the tenant only. The *Luhrig Company* reserved no right to enter and take away the machinery if it should not be paid for, and they have no such right. They would be trespassers if they came upon the land. The mortgage to the bankers by the tenant gave the former a right to remove the tenant's fixtures: *Southport and West Lancashire Banking Company* v. *Thompson* (5). The stipulation in the agreement with the *Luhrig Company* that the machines shall continue to belong to the vendors after they have been fixed to the freehold is one which the law does not

(1) 3rd Ed. p. 387.
(2) 4 B. & Al. 206.
(3) [1891] 1 Ch. 627.
(4) [1891] 3 Ch. 540.
(5) 37 Ch. D. 64.

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permit. After a thing is once affixed to the freehold it cannot be the property of any one but the landowner. The bank have a charge by virtue of their mortgage upon the qualified interest of the mortgagors in that which is the landlord's property. If there were no mortgage and the bank were the owners of the property in fee, the property in the machines, if fixed to the land would belong to them, in spite of the agreement with the *Luhrig Company*. The agreement is not equivalent to a regrant of the property in the machines to the *Luhrig Company*; such a regrant cannot be implied. *Bellamy* v. *Davey* (1) does not apply. There is no authority for saying that any one but a tenant can remove tenant's fixtures, and the *Maryport Company* have not granted their right of removal to any one but the bankers.

[NORTH, J.:—In *Poole's Case* (2), Lord *Holt*, speaking of trade fixtures, said, "After the term they become a gift in law to him in reversion, and are not removable." This seems to shew that tenant's fixtures are not the property of the owner in fee during the term.]

Cozens-Hardy, Q.C., then opened the summons of the Plaintiffs:—

The receiver has clearly a right to abandon the colliery and to remove the loose chattels, subject to any objection which the landlord may be entitled to make. The landlord is not entitled to distrain for rent which accrued due before the commencement of the winding-up; he must prove for it in the liquidation. The rent which has accrued since the winding-up must, of course, be paid.

Ashton Cross and *Quarrell*, for the landlord:—

The landlord is entitled to distrain for rent accrued before the winding-up, because the Plaintiffs' mortgage debt and debentures will exhaust the whole value of the company's property.

[*Cozens-Hardy*, Q.C., said that he did not admit this.]

The liquidator has, therefore, no interest in the matter, and the

(1) [1891] 3 Ch. 540. (2) 1 Salk. 368.

landlord is entitled to distrain as against the bank: *In re New City Constitutional Club Company* (1). And the landlord could have distrained before the winding-up, but for the accident that the receiver was in possession. And the receiver holds possession for the benefit of all persons entitled, according to their respective rights.

[NORTH, J.:—I think that the landlord must prove for the rent due down to the actual commencement of the winding-up. I do not see that he was prevented from distraining; and if he was prevented by the act of the mortgagees, I do not see how that can enlarge his rights against the mortgagors.

Cozens-Hardy:—If we are allowed to remove the loose plant, we will pay the rent accrued due since the winding-up.]

The machine erected by the *Luhrig Company* is not really attached to the freehold, and the landlord has a right to distrain upon it.

NORTH, J. (after stating the provisions of the contract of the 2nd of July, 1889, continued):—

But for the special provisions of this agreement, the property in the machinery would have passed to the purchasers when it was erected. But there is in the agreement a clear and distinct stipulation that, until it has been paid for, the machinery is to remain the property of the vendors. In my opinion, as between the parties to that agreement, there is nothing in law to prevent that stipulation from taking effect. The *Maryport Company* had previously executed a mortgage of their colliery to the Plaintiffs, and the mortgage deed provided that, not only the existing machinery and chattels, but also all the machinery and chattels to be thereafter brought upon the premises, should be included in the security. That, in my opinion, was a perfectly good bargain as between the parties to it. But I think it was not in the power of the mortgagors to confer on their mortgagees a better title than they themselves had to the property which they agreed to mortgage to them. The *Maryport Company* (the mortgagors) cannot be heard to say that the machinery in

(1) 34 Ch. D. 646, 661.

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question is not the property of the *Luhrig Company*, and the banking company (their mortgagees) do not stand in any better position. But it was argued that, so soon as the machinery was fixed upon the premises, the property in it vested in the landlord. I am by no means satisfied that it did, or that, so long as he remained a reversioner, he would have any right of action in respect of the machinery. No doubt, if it had remained upon the demised premises at the end of the term, it would have become the property of the owner in fee of the land, subject to this, that the tenant might have had a right to remove it, so long as he continued in possession of the demised property. I am not satisfied that down to the end of the term the landlord would have had any property in the machinery. But, assuming that he would, still the only claim now made adversely to the *Luhrig Company* is made by persons who derive title not under the landlord but under the tenant. As regards the landlord, all that I have to take care is that he gets his rent accrued since the winding-up commenced. As the receiver is going to abandon the colliery, I think the *Luhrig Company* are entitled to remove the machinery which they claim. It was more convenient that the motion and the summonses should be heard together; but there will be two separate Orders, one upon the motion and the other upon the two summonses.

MINUTE OF ORDER ON MOTION:—Leave to Applicants to remove the machinery in question before the 1st of February, 1892. Plaintiffs to pay Applicants costs of motion, and to add them to their own costs, which are to be their costs in the action.

MINUTE OF ORDER ON THE TWO SUMMONSES:—One order on the two summonses. Liberty to receiver to give up possession of the *Ellenborough Colliery* and (as between the receiver and the landlord), to remove all chattels, &c., from the premises. The Plaintiffs submit to pay the rent from the 14th of March to the 31st of December, 1891. Liberty to the landlord to prove for arrears of rent down to the 14th of March, 1891. No costs to landlord. Costs of Plaintiffs to be their costs in the action.

Solicitors: *G. M. Light*; *Harrison & Powell*, agents for *Houghs, Carlisle*; *J. R. Hobson*, agent for *Tyson & Hobson, Maryport.*

W. L. C.

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[1890 R. 2334.]

Specific Performance—Covenant to employ Resident Porter—Lessor and Lessee—Building let in Flats—Injunction.

The lease of a residential flat, in a block of buildings let in flats to several tenants, contained a covenant by the lessors to employ a resident porter, who was to act as the servant of the tenants of the several rooms in the block, and to be constantly in attendance in such block, either by himself, or, in his temporary absence, by some trustworthy assistant.

The lessors appointed a cook and his wife to reside upon the premises, and permitted the cook to carry on his business as such, and provide boys and charwomen to do his duties of porter; and for some months he was engaged four hours daily, with the assent of the lessors, as *chef* at a neighbouring club:—

Held, that the lessors had committed a breach of the covenant, to prevent the continuance of which breach the lessee of the flat was entitled to a perpetual injunction, upon the ground that the lessors had never appointed a porter at all within the meaning of the covenant.

By an indenture of lease dated the 2nd of July, 1889, the Defendants demised to the Plaintiff six rooms on the fourth and fifth floors of the building known as "*Westminster Chambers*," together with the use, in common with the other tenants of the said chambers, of the entrance-hall and the stairs leading to the demised premises, to hold the same for twenty-one years from the 24th of June, 1889, at the yearly rent of £75. The lessee covenanted not to use or occupy the demised premises for any purpose other than for residential chambers.

The lease contained also the following clause:—

"And it is hereby agreed and declared by and between the parties hereto that the premises hereinbefore expressed to be hereby demised are taken by the lessee subject to the regulations made by the lessors with respect to the duties of the resident porter and other matters for the general convenience of tenants. These regulations are set forth in the schedule hereunder written, and are to be considered as forming part of these presents. The lessors, however, reserve to themselves the right of altering and

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modifying the regulations (except in the case of the present lessee as to the supply of coal) from time to time as the convenience of the tenants or other special circumstances may render desirable." The schedule was, so far as material, as follows: "(1.) The property of the lessors is divided into seven distinct blocks, each having an entrance into *Victoria Street*, and the rooms in each block are, together with the entrance and staircase belonging to it, in charge of a resident porter appointed and removeable by the lessors, but who shall be and act as the servant of the tenants of the several rooms in the block." "(3.) Tenants have the right to the general services of the porter resident in their block within the scope of his general duties as defined by rule 6." "(4.) Tenants have the right to the special services of such porter as defined by rules 8, 9, and 10." "(6.) The general duties of the porter, which the tenants are entitled to have performed for them free of extra charge, are as follows: (*a*) To be constantly in attendance in the section of the building committed to his charge, either by himself, or, in his temporary absence, by some trustworthy assistant. (*b*) To cleanse every morning, before 9 o'clock A.M., the general stairs, passages, lifts, and entrances attached to the section, and to attend to the lighting and extinguishing of gas therein. (*c*) To receive and deliver to the several tenants all letters, parcels, and messages, and to receive the keys of the outer doors of the several sets of rooms from the tenants for safe custody, on their leaving for the night." "(8.) The special services of the porter, which he is bound to render to the several tenants, if required, at a charge of 1*s.* 6*d.* per week for each room, comprise the cleaning and arrangement of each such room, and the lighting of the several fires, whenever required." "(9.) Any extra services required of the porter by the tenants, and which are not inconsistent with his general duties, are to be the subjects of special arrangement between them." "(10.) Any services rendered by the porter will be rendered as the servant of the tenant, and for which, or the consequences whereof, the lessors will not be responsible."

The Plaintiff, on the 24th of December, 1890, commenced his action against the company, and by his statement of claim he alleged that since the date of his lease he had occupied the

demised premises and paid his rent and performed his covenants, but that the Defendants had omitted and refused to appoint a resident porter to take charge of the block in which the Plaintiff's premises were situate, to be and act as the Plaintiff's servant according to the regulations in the schedule. The Plaintiff also alleged that a porter had been appointed by the Defendants, but that such porter was not constantly in attendance in the section of the building committed to his charge, either by himself, or, in his temporary absence, by some trustworthy assistant, and that such porter had wilfully and persistently omitted and neglected to attend on the Plaintiff according to the said regulations, and to receive and deliver to the Plaintiff all letters, parcels, and messages, and that such porter had not been available when required for the Plaintiff to arrange with him for any extra services not inconsistent with his general duties, whereby the Plaintiff had suffered great annoyance, inconvenience, and damage. And the Plaintiff claimed—(1.) "An injunction against the Defendants to restrain them from employing as the porter in charge of the said block, No. 7, *Victoria Street*, any person who is not resident and constantly in attendance therein, and able and willing to act as the servant of the Plaintiff according to the regulations contained in the said schedule; (2.) Specific performance of the agreement . . . . to appoint a resident porter in charge of the said block"; (3.) £100 damages for breaches of the covenants.

By their statement of defence, the Defendants denied that they had omitted and refused to appoint a resident porter, and alleged that the resident porter appointed had always been in attendance by himself or some trustworthy assistant in accordance with the regulations. The Defendants also denied that the porter had neglected his duties, or not been always available for any special services required by the Plaintiff. They also denied that any damage had been occasioned to the Plaintiff; but paid 10*s.* into Court, and pleaded that that sum was sufficient to answer the Plaintiff's claim.

The action was tried before Mr. Justice *A. L. Smith*, sitting for Mr. Justice *Romer*, on the 15th of February, when it was proved that there was only one other residential suite of chambers in

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the block besides that of the Plaintiff; but there were several suites of business chambers in such block. That the porter, Benton, was a *chef*, and his wife had been a lady's-maid. That they had both been in the employment of the family of the secretary to the Defendant company. That *Benton* took the engagement of resident porter in May, 1887, and with his wife went and resided upon the premises. At this time he was acting as a *chef* at a City hotel or restaurant, and he continued so to act until July, 1889. From November, 1890, till August, 1891, he had been employed from 11 A.M. to 3 P.M. on week-days at a luncheon club at 3, *Victoria Street, Westminster*, at the instance of the directors of the Defendant company. He was at home on Sundays, when an old woman usually acted for him in his duties as porter, and was backwards and forwards on week-days. He had always the assistance of a lad in the performance of his duties; but he did not reside upon the premises. It was proved by the Plaintiff and his witnesses that *Benton* rarely acted as porter, and his wife sometimes answered the door bell. The door was occasionally opened by Miss *Benton*, the porter's niece, and sometimes by a charwoman or cleaner, but generally by a boy in his shirt-sleeves and wearing an apron. That these boys and charwomen were the persons who really performed the duties prescribed to the porter.

Haldane, Q.C., and *Warrington*, for the Plaintiff:—

There are two questions to be decided. First, whether, on the construction of the lease, the person employed by the Defendants was such a porter as the Defendants covenanted to employ; secondly, whether the Court can by injunction compel the Defendants to perform such a covenant. The covenant means that a man shall be employed who shall be competent to perform the duties of a porter, and shall be constantly in attendance, and that during his occasional absence he shall employ a trustworthy and competent substitute.

With regard to the question of jurisdiction, there are, no doubt, many cases of contracts for personal services in which the Court will not grant an injunction to restrain a breach, but will leave the parties aggrieved to their remedy in damages. But in a case

like this damages are not an adequate remedy, and the Plaintiff would have to be continually bringing actions in order to obtain anything like adequate damages. The case is more like those in which possession of land has been obtained on the condition of the party obtaining possession doing certain personal services; and in these the Court will grant an injunction, though in form the covenant is not a negative one: *Wolverhampton and Walsall Railway Company* v. *London and North Western Railway Company* (1).

[They were stopped.]

Chadwyck Healey, Q.C., and *Swinfen Eady*, for the Defendants:—

This is really an action to compel specific performance of a contract for personal services, and the only remedy for a breach of it is in damages. The Court will not attempt to enforce the agreement by specific performance, for it cannot be always watching the porter to see whether he performs his duties. The Court will in some cases grant an injunction to prevent the breach of a contract for personal services; but not where, as in this case, the contract is substantially an affirmative and not a negative agreement: *Whitwood Chemical Company* v. *Hardman* (2). But the Defendants have really performed their agreement, having appointed a porter whose duties have always been discharged by himself or a competent substitute. Moreover, the Defendants have power to alter the schedule.

[A. L. SMITH, J.:—Only for the benefit of the tenants.]

The Plaintiff is really bringing an action through the Defendants against his own servant. The form of covenant in this lease has already been the subject of decision, and it has been held that "it is quite a mistake to say that the porter is the representative of the lessors; he is appointed by them, but he is so appointed because it is a convenient arrangement where houses are let in different sets of apartments or rooms that there should be a porter appointed by some one. There might be a difference of opinion as to the choice of a porter if it was left entirely to the tenants, and therefore the lessors reserved the power of appointing him": *Reg.* v. *St. George's Union* (3).

(1) Law Rep. 16 Eq. 433. (2) [1891] 2 Ch. 416.
(3) Law Rep. 7 Q. B. 90, 104.

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A. L. SMITH, J.:—

This is an action to enforce a covenant contained in a deed dated the 2nd of July, 1889, and the substance of the cause of action is that the Plaintiff has not had the services which the lessors covenanted for by the lease.

These chambers, apparently, were built for business premises; but of recent years the two top storeys have been let as residential apartments, and one of these top flats has been let to the Plaintiff, who resides there with his wife and family. The Plaintiff, on his part, undertook with the lessors to perform certain covenants, and the lessors (I am going to summarize paragraphs 1, 2, 3, and 4 of the schedule to the lease) undertook with him that during the term he should have the services of a resident male porter, such services including general services and special services—I am leaving out the extraordinary services. That resident male porter was not to be always on the premises; he might be temporarily absent, and was entitled to go to church, or for a walk, and so on, and, as I read the covenant, during the temporary absence of the male porter some assistant was to be left in his place.

In my judgment, the business meaning of that covenant is, that the Plaintiff, a resident in the flat leased to him, should have a male attendant, a man-servant who should perform the duties which are ordinarily performed by a man-servant as porter.

Now, what has happened? *Benton* is a cook. At the date of his engagement he was married to the lady's-maid who had been in the employment of the family of the secretary to the Defendant company, and accordingly the position of porter in this building was thought to be a good place in which to put the lady's-maid and the *chef*. According to the uncontradicted evidence before me, from the very first it was arranged between *Benton* and the directors of the company, that the person who was to assume the duties of a resident male porter should not be a resident male porter at all, but the boys and charwoman were to do the work which otherwise the porter would have had to do. As a matter of fact, after the evidence which has been given on both sides, I have no hesitation in holding that, practically, the sole services which Mr. *Ryan*, his wife and family have had from

July, 1889, down to the present time have been the services of these boys, coadjuted by the charwoman and Miss *Benton*, and that they have not had the services of a resident male porter as stipulated for in the schedule to the lease. Is the Plaintiff entitled to the services of a resident male porter? I think he is.

It has been proved that *Benton* went away from the chambers for four hours a day, viz., from 11 A.M. to 3 P.M. during nine months, from November, 1890, to August 1891; and this was done at the instance of the directors, which does not look as if the directors were thinking of performing their obligation. It appears to me that the Plaintiff has made out his case, and that the Defendants have never appointed a male porter at all within the meaning of the covenant.

Now comes the question, What ought I to do? The case of *Wolverhampton and Walsall Railway Company* v. *London and North Western Railway Company* (1) has been cited to me as an authority for granting an injunction in the form of the claim in this action; but it has been contended on behalf of the Defendants that difficulties might arise in enforcing such a judgment, and that I cannot grant the injunction asked for because the covenant of the Defendants is a personal contract. There is no necessity for the Court watching the porter, as Mr. *Chadwyck Healey* suggests. My judgment is, that the Defendants appoint a resident male porter pursuant to the covenant.

I will grant an injunction, or decree specific performance of the covenant, if that is the more appropriate course; and in case it is held in the Court of Appeal that I ought not to have done so, I assess the damages down to date of action brought at £25.

Solicitor for Plaintiff: *E. F. M. Ryan.*

Solicitors for Defendants: *Troutbeck & Barnes.*

(1) Law Rep. 16 Eq. 433.

F. E.

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1891

Dec. 10, 11.

BRUNTON *v.* ELECTRICAL ENGINEERING CORPORATION.

[1891 B. 1055.]

Company—Debenture-holders—Debenture—Condition—"Floating Security"—"Charge"—Receiver—Solicitor's Lien—Title Deeds—Priority—Mortgagor and Mortgagee.

A limited company issued mortgage debentures charging all its undertaking and property, one of the conditions of the debentures being that they were to rank *pari passu* as a first charge and to be a "floating security," but so that the company should "not be at liberty to create any mortgage or charge in priority to the said debentures." There was no trust deed for further securing the debenture debt. Subsequently an order appointing a receiver was made in a debenture-holders' action, the company being ordered to deliver up to such receiver all documents relating to the property comprised in the debentures. The company's title deeds were then in the possession of their solicitor, who refused to deliver them up, claiming a lien for costs incurred by the company to him as their solicitor prior to the appointment of the receiver:—

Held, that so long as the debentures continued to be a "floating security"—that is, until the appointment of the receiver—they did not interfere with the company's business being carried on in the ordinary way, and the debenture-holders could not prevent the company's solicitor, employed by them in the usual course of their business, from acquiring the ordinary solicitor's lien; and that, inasmuch as that lien was a right given by the general law, and not a "charge," or, at any rate, not a charge "created" by the company, the solicitor was not precluded by the condition of the debentures from asserting his lien in priority to the debenture-holders.

A "floating security" discussed.

In re Horne & Hellard (1) considered.

In re Snell (2) and *In re Mason and Taylor* (3) distinguished.

ADJOURNED SUMMONS.

In January, 1890, the Defendants, the *Electrical Engineering Corporation, Limited*, were incorporated under the *Companies Acts*, 1862 to 1886, as an amalgamation of two existing companies. Mr. *Henry Spawforth Holt* had been acting as solicitor to one of the amalgamated companies, and after the amalgamation he acted as solicitor to the corporation in the conduct of

(1) 29 Ch. D. 736. (2) 6 Ch. D. 105.
(3) 10 Ch. D. 729.

its business. In February, 1890, the corporation commenced issuing mortgage debentures, and continued to issue them until November, 1890, when the whole authorized issue of £20,000, in 200 debentures of £100 each, was completed.

By each debenture the corporation purported to charge with the payment of the amount of the debenture, and interest at 6 per cent. per annum, "its undertaking and all its property, whatsoever and wheresoever, both present and future." The first "condition" of the debenture was in the following form:—

"This debenture is one of a series of 200 debentures issued, or about to be issued, by the corporation. The debentures of the said series are all to rank *pari passu* as a first charge on the property hereby charged without any preference or priority one over another, and the charge hereby created is to be a floating security, but so that the corporation is not to be at liberty to create any mortgage or charge in priority to the said debentures."

The form of debenture was prepared by Mr. *Holt*, the latter part of the above condition being inserted in consequence of the decision in *Wheatley* v. *Silkstone and Haigh Moor Coal Company* (1), where Mr. Justice *North* held that debentures in a form purporting to charge the property of the company with the debenture debt, to the intent that the debentures should rank equally as a first charge, did not preclude the company from creating, in the ordinary course and for the purpose of their business, a mortgage or charge in priority to the debenture-holders.

At the time Mr. *Holt* prepared the form of debenture, the corporation's title deeds and other documents were in his custody as their solicitor, and remained so after the debentures had been issued. There was no trust deed for further securing the debenture debt.

The interest on the debentures having fallen into arrear, this debenture-holders' action was instituted, and by the judgment in the action, dated the 20th of March, 1891, a receiver and manager was appointed, and the Defendant corporation was ordered to deliver up to him all documents relating to the property comprised in the debentures. The receiver and

(1) 29 Ch. D. 715.

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manager thereupon applied to Mr. *Holt* for the deeds and documents of the corporation then in his possession; but he declined to deliver them up without being first paid a sum of about £230 for professional work done by him for the corporation, for which sum he claimed a lien upon all the documents in his possession. Ultimately, as the receiver and manager found himself unable, in the absence of the corporation books and papers, to carry out his duties under the judgment in the action, an order was made on the 8th of June, 1891, requiring Mr. *Holt* to deliver up the documents in his possession to the receiver and manager, upon the terms of the latter paying £270 into Court in the action to answer Mr. *Holt's* lien, if any, and this order was duly complied with. Mr. *Holt* then took out the present summons asking for a declaration that he had, before and at the date of the order of the 8th of June, 1891, a lien upon the documents therein mentioned, and was consequently entitled to have the costs in respect of which such lien was claimed paid out of the £270 in Court.

Resolutions had been passed in April, 1891, for winding up the corporation voluntarily and appointing the receiver and manager liquidator. In May, 1891, a supervision order was made, the liquidator being continued.

Renshaw, Q.C., and *Bramwell Davis*, for the Applicant, Mr. *Holt*:—

The lien is objected to on the part of the Plaintiff on two grounds: first, that Mr. *Holt* acted for the debenture-holders as well as for the company, and, therefore, cannot claim as against the former any lien on the title deeds forming part of their security; and secondly, that by reason of the terms of the debentures the company had no power to create such a lien. *In re Snell* (1) and *In re Mason and Taylor* (2) are relied on in support of the first ground of objection; but in both these cases there were trustees for the debenture-holders, and the solicitor was acting for such trustees. In the present case, when the Applicant prepared the form of debenture, there were no trustees or mortgagees and there was no *constat* that there ever would be

(1) 6 Ch. D. 105. (2) 10 Ch. D. 729.

any. There was, in truth, no client to whom any deeds could be handed over; but all the deeds remained, and rightly remained, in the possession of the company. The rule laid down in *In re Snell* (1) is that, if the same solicitor is acting for both mortgagor and mortgagee, he must do his best for both, and he is bound to see that the documents relating to the mortgage are handed over to the mortgagee himself and not to retain them in his (the solicitor's) possession; consequently he has no lien upon them. But that does not apply to such a case as this, where the documents could not be handed over to the mortgagees.

Then, as to the second ground of objection, by the terms of the debentures the company are, no doubt, precluded from creating any mortgage or charge. But the debentures are in the nature of a floating security, and under such a security it is necessarily implied that the company may carry on its business in the ordinary way until stopped either by a receiver or a winding-up, and for that purpose may employ solicitors, bankers, and other agents: *In re Florence Land and Public Works Company* (2); *In re Colonial Trusts Corporation* (3). In *Wheatley* v. *Silkstone and Haigh Moor Coal Company* (4), it was held that a company could, in the ordinary course of and for the purposes of its business, give a charge in priority to the debenture-holders. So here, the company in carrying on its business and employing a solicitor for that purpose, could give him a lien on documents in his possession as solicitor. But further, we say that a solicitor's lien is not a charge or incumbrance affecting the estate or property itself. The nature of the lien is stated by Mr. Justice *Chitty* in *In re Llewellin* (5), referring to *Pelly* v. *Wathen* (6), where Lord *Cranworth* described it as nothing more than the right given to the solicitor by the general law to keep back from his client the documents which he holds as solicitor until his bill is paid. The mere fact of a solicitor acting for both parties does not prevent him from claiming priority for a charge arising by the general law, of which everybody must be taken to have notice: *Macfarlane* v. *Lister* (7), where *In re Snell* is

(1) 6 Ch. D. 105.
(2) 10 Ch. D. 530.
(3) 15 Ch. D. 465.
(4) 29 Ch. D. 715, 724.
(5) [1891] 3 Ch. 145, 147–8.
(6) 1 D. M. & G. 16, 23.
(7) 37 Ch. D. 88, 94.

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explained. But even if this lien were a charge, it is not a charge "created by the company," and, therefore, not within the terms of the debenture.

Warmington, Q.C., and *Swinfen Eady*, for the Plaintiff:—

This is a new case, arising on a form of debenture adopted since Mr. Justice *North's* decision in *Wheatley* v. *Silkstone and Haigh Moor Coal Company* (1). We submit that the effect of the debenture is to preclude the company from interposing any lien or charge in priority to the debenture debt. It is true that the debenture is a "floating security," which gives the company all the powers mentioned in *In re Florence Land and Public Works Company* (2), and *In re Colonial Trusts Corporation* (3); but there is nothing in the judgments in those cases saying that those powers cannot be negatived, as we contend they are negatived here. To what extent a debenture is a "floating security" must be ascertained from the terms of the document, as in *In re Horne and Hellard* (4), where *Pearson*, J., held the words of the debenture there in question to constitute a floating security until default in payment of the principal or interest secured, and not until the appointment of a receiver or a winding-up, thus distinguishing the case from the two other cases above cited. With regard to *In re Snell* (5), we submit that Mr. *Holt* acted as solicitor for the mortgagees within the meaning of that case.

KEKEWICH, J.:—

There is a neat question to be decided in this case, and one of some novelty, on the construction of a mortgage debenture drawn in the form now in common use; but, before coming to that, I must consider whether this case falls within the authority of *In re Snell*, and the subsequent case of *In re Mason and Taylor* (6), before Vice-Chancellor *Hall*, which was precisely on the same lines. *In re Snell* has been explained by Lord Justice *Cotton* in *Macfarlane* v. *Lister* (7), and he puts the

(1) 29 Ch. D. 715.
(2) 10 Ch. D. 530.
(3) 15 Ch. D. 465.
(4) 29 Ch. D. 736.
(5) 6 Ch. D. 105.
(6) 10 Ch. D. 729.
(7) 37 Ch. D. 88, 94.

case on this, that it is the duty of a solicitor who is acting at the same time for mortgagor and mortgagee, to hand over the title deeds (that is to say, all the documents which are in an ordinary transaction passed from mortgagor to mortgagee) from the one client to the other; the suggestion being, not that the documents really pass out of his office at all, but that, inasmuch as he holds them for both mortgagor and mortgagee, after the mortgage he holds them for the mortgagee, and cannot say that he holds them as solicitor for the mortgagor so as to entitle him to claim a lien in priority to the mortgage. But that seems to me to have no application whatever to a case where there would be no handing over of deeds if two solicitors were acting separately for the mortgagor and the mortgagee respectively, or to a case in which a company desirous of issuing debentures issues them in the form of a floating security, or of a security such as used to be granted before floating securities were invented. In such a case the company would continue in possession of the deeds and documents, and the solicitor acting on behalf of the debenture-holders would receive nothing. Having disposed of that point, I now come to the question I have already described as not only neat but novel.

The question is this: Given a floating security in the form which is now familiar to the Court and to those conversant with company business, is it competent for the company which creates that security to employ a solicitor, so as to allow that solicitor to acquire that general lien which, according to law, he has upon documents in his possession belonging to his client? That is the question which I have to consider. That the company is allowed to employ a solicitor, goes without saying. What is a floating security? I should hesitate to attempt to define it, because definitions are dangerous; but, fortunately, I have a definition already provided: I have it, in the first instance, in the case of *In re Florence Land and Public Works Company* (1). The late Master of the Rolls, in his judgment in that case (2), calls it "a security"—he does not use the word "floating"—"on the property of the company as a going concern, subject to the powers of the directors to dispose of the property of the

(1) 10 Ch. D. 530. (2) 10 Ch. D. 540.

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company while carrying on its business in the ordinary course." And further, I have a definition in the judgment of Lord Justice *James* in the same case, which I quote because it has been quoted in other cases. He says (1), it is a charge on "the assets for the time being" of the company, and does not prevent *the company carrying on its business; and so it was held in the* case before Mr. Justice *North* of *Wheatley* v. *Silkstone and Haigh Moor Coal Company* (2), the result of the decision in that case being, it appears, that a special form has been invented to meet the difficulties which that decision gave rise to, and I have that special form before me for construction now. The form is this: 'The charge hereby created is to be a floating security, but so that the corporation is not to be at liberty to create any mortgage or charge in priority to the said debentures."

Mr. Justice *Pearson* in the case of *In re Horne & Hellard* (3), did use the word "floating"; and, without wishing to be hypercritical, it seems to me that the learned Judge used it with some slight inaccuracy. I should say that a floating security remained such until a receiver was appointed of the company's property, or until there was a winding-up. Here the security is expressed to be a "floating security"; it becomes so the moment it is given; it floats from the first issue of debentures; it is not a floating security from a certain point, but it is a floating security to begin with; and what that means I have already said.

Then the charge prohibited is a charge that is "created." Now, does this clause in the debenture prevent a company employing a solicitor and giving him a lien? In my opinion, it does not. *Pelly* v. *Wathen* (4) shews what a solicitor's lien is. There Lord *Cranworth* says: "The general lien of a solicitor is merely a right to keep back from his client the deeds and papers, which he holds as solicitor, until his bill of costs is satisfied." Taking that view of a solicitor's position and of a client's position, is there anything to prevent a company from employing a solicitor and giving him his proper rights? I am clearly of opinion that there is not.

The debenture-holders have no right to interfere with the

(1) 10 Ch. D. 547.
(2) 29 Ch. D. 715.
(3) 29 Ch. D. 736.
(4) 1 D. M. & G. 23.

position of the company; they have no right to interfere with the use by the company of their property in the ordinary course of business; and they can do nothing really which will prevent the company from making away with the whole of their property and leaving nothing for them, the debenture-holders. The company are masters of their position, and the debenture-holders cannot themselves do anything to prevent the solicitor from acquiring the right which the general law gives him. Then, do the words of the debenture prevent his acquiring that right in priority to the debenture-holders? It says that the corporation shall not create any "mortgage or charge" in priority to the debentures. It does not seem to me that this right of the solicitor is a "mortgage or charge" within those words; it is a lien which is given him by the general law. It is difficult to state the nature of the right in accurate language. It has been said it is the right of the solicitor to sit upon his client's deeds in his possession; he can lock them up and say to his client, "You shall not have them until you have paid my costs."

Looking at this clause in the debenture, I think that the words "mortgage or charge" do not include a lien of this kind. But even supposing it is a "mortgage or charge," is it a mortgage or charge "created by the company"? In my opinion, it is not. The clause in the debenture points to something done by the company so as to create, by their own act, an incumbrance upon their property which, but for this provision, would take priority of the debentures. I do not think it applies to a mortgage or charge given by the general law, and arising through the company carrying on its business in the ordinary course. So long as the company are acting according to the ordinary course of business and not so as to give their solicitor any advantage by their own direct act, but are merely allowing him, in the ordinary course of business, to acquire that lien which the law gives him, I think they are not creating a mortgage or charge in his favour. I think, therefore, the general lien of a solicitor is untouched by the debenture-holders taking possession, as they have done and as they had a right to do, by obtaining the appointment of a receiver. Up to the date of that appointment the employment by the company of a solicitor gave that solicitor

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his ordinary rights; and I understand from the facts that that really covers the whole matter in dispute, because everything that has been done by the solicitor was done before the debenture-holders took possession.

I, therefore, hold that the solicitor is entitled to have the costs in respect of which he claims his lien paid out of the fund in Court, in priority to the claim of the debenture-holders.

Solicitors: *H. S. Holt; Dowson & Co.*

G. I. F. C.

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Jan. 26.

ENGEL *v.* SOUTH METROPOLITAN BREWING AND BOTTLING COMPANY.

[*1891 E. 4.*]

Company—Winding-up—Debenture-holders—Receiver and Manager—Official Liquidator—Right to Custody of Books and Documents—Companies Act, 1862, *ss.* 23, 25, 26, 27, 32, 43, 56, 58, 67, 100, 154, 155, 156 [*Revised Ed. Statutes, vol. xiv, pp.* 207, 208, 209, 212, 215, 216, 217, 224, 236]; *Companies (Winding-up) Act,* 1890, *ss.* 4, *sub-s.* 3, 7, 8, *and Sched.* 1, *cl.* 3.

A company issued debentures which were a charge on the whole of the company's property and assets, including the uncalled capital. In an action by the holder of the debentures a receiver and manager was appointed. An order was afterwards made for the winding-up of the company. The company had ceased to be carried on as a going concern:—

Held, that the official liquidator was entitled to the custody of such of the books and documents of the company as related to its management and business and were not necessary to support the title of the holder of the debentures.

By the order appointing the receiver and manager it was directed that all books and documents relating to the property and assets of the company should be delivered to him; and he accordingly took possession and retained the custody of them. Upon an application by the official liquidator:—

Held, that it was competent to the Court to vary the order from time to time as seemed expedient for the purposes of the action and the winding-up, and, accordingly, that an order might be made for delivery of certain of the books and documents to the liquidator on an undertaking by him to produce them to the receiver or the Plaintiff.

ADJOURNED SUMMONS.

The Defendants were a company which was incorporated for

the purpose of taking over the lease and goodwill of the *Hatcham Brewery*, together with the stock and plant and several public-houses.

In January, 1890, the company issued twenty-five debentures for £1000 each, which were expressed to be a charge on "all the property of the company whatsoever and wheresoever, both present and future, including the uncalled capital." The Plaintiff was the holder of all these debentures, which constituted the entire debenture issue.

On the 18th of December, 1890, a petition was presented for the winding-up of the company.

On the 2nd of January, 1891, this action was commenced by the Plaintiff to enforce the securities comprised in the debentures.

On the 7th of January, 1891, an order was made in the action appointing a receiver and manager, and directing the company to deliver to him "all books, leases, deeds, papers and documents relating to the property and assets comprised in" the debentures; and under that order the whole of the company's books and documents were handed over to, and remained in the possession of, the receiver.

On the 17th of January, 1891, an order was made for the winding-up of the company.

By an order of the 13th of July, 1891, the Official Receiver was appointed permanent official liquidator of the company.

The company was no longer being carried on as a going concern.

This was a summons taken out by the Official Receiver as liquidator, asking that the receiver might be ordered to deliver over to the Applicant certain of the books and documents in the possession of the receiver. The books and documents in question were specified in a schedule and included (*inter alia*) the registers of members and mortgages, share certificate books, letters, press copies of letters, cash-books, bank-books, day-books, ledgers, and minute-books, but did not comprise any documents of title.

The receiver had freely allowed inspection of these documents, and was willing to continue to do so, but desired to retain the custody of them.

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It was admitted that the question in the particular case was one of little moment, but it was submitted to the Court by way of test in other cases.

Ingle Joyce, for the Official Receiver, in support of the summons:—

These books and documents are not in terms comprised in, and did not pass by, the debentures: *In re Clyne Tin Plate Company* (1).

Even if the terms of the debentures were sufficient to include the books and documents, they could not pass thereby, inasmuch as, on the true construction of the Acts of Parliament and articles of association regulating this company, the directors had no power to mortgage them. The provisions of the *Companies Acts* shew clearly that the company is intended to retain possession of all documents such as those comprised in the schedule. Thus sects. 23 and 25 of the *Companies Act*, 1862 (25 & 26 Vict. c. 89), provide that the company shall cause to be kept a register of its members, and by sect. 32 it is required that the register shall be kept at the registered office of the company. Sect. 26 provides for an annual list of members to be contained in a separate part of the register. Sect. 27 imposes a penalty on any company not keeping a proper register. Sect. 43 requires that a register of mortgages shall be kept, and be open to inspection by any creditor or member at all reasonable times. By sect. 56 the Board of Trade may appoint inspectors to examine into the affairs of a company, and by sect. 58 all officers and agents of the company are required to produce books and documents for the examination of the inspectors; and it is necessarily implied that the custody of the necessary books and documents is to remain with the company's officers and agents. Sect. 67 requires that minutes of proceedings at meetings should be duly entered in books provided for the purpose, and this is to be done whether there are debentures or mortgages or not. Sect. 100 expressly empowers the Court, in the case of a winding-up, to order that books and papers shall be delivered to the official liquidator by any "receiver," agent, or officer of the company. By sect. 154,

(1) 47 L. T. (N.S.) 439.

when any company is being wound up, books and documents of the company and of the liquidators are made *primâ facie* evidence as between the contributories, and, if so, they must be capable of being produced. Sects. 155 and 156 in like manner contemplate production to and inspection by contributories and creditors. Further, by the *Companies (Winding-up) Act*, 1890, sect. 4, sub-sect. 3, the liquidator of a company is to give the Official Receiver such access to and facilities for inspecting the books and documents of the company as may be requisite for enabling that officer to perform his duties. The liquidator cannot give those facilities unless he has the books and documents By sect. 7 a statement of the company's affairs is to be made out and submitted to the Official Receiver; by Sched. 1, cl. 3, a summary of this statement is to be sent by him to each creditor and contributory; and by sect. 8 the Official Receiver is required to make a report to the Court as to the capital, the estimated assets and liabilities, the causes of failure, and other matters. It would be impossible for anyone to make out such statement or report unless the books were under his immediate control. These enactments read together as a whole clearly contemplate, and in effect require, that the books shall remain in the custody of the officers of the company while it is a going concern, and, on its being wound up, shall be in the custody of the liquidator. No doubt the books are the property of the company, but, upon the true construction of the statute, the company has no such absolute assignable interest in them as will entitle them to deprive themselves of the custody of the books so long as the purposes of the statute remain to be performed.

The provisions of the company's articles of association are to a like effect, and indicate that the books of the company are to be continuously under the control of the company's officers.

[KEKEWICH, J., referred to *In re Joshua Stubbs & Co.* (1).]

Neither that case nor the cases as to solicitors' lien, in any way conflict with this view. A company must employ a solicitor, and he must have the necessary papers placed in his hands, and he may be entitled to retain such as are not required to be kept at the company's office.

(1) [1891] 1 Ch. 187.

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The right of debenture-holders must be confined to such documents of title as are required to support their security. The company have no more right to hand over the books and documents relating to the management of their business to debenture-holders, than they would have to hand them over to any particular creditor.

All the documents specified in the schedule appear to be of the same character, and the Official Receiver claims the custody of them all.

Warmington, Q.C., and *Solomon*, for the Plaintiff:—

This matter is concluded by the order of the 7th of January, 1891, appointing the receiver and manager, and the present application is in effect an appeal from that order. It was made in the presence of the company; and even if it was wrong, it cannot be set right now.

All these books and documents appear to relate to the property and assets of the company. If any do not, the Plaintiff is willing that they should be delivered to the Official Receiver; but as to the rest, he is entitled to retain them by the hands of his receiver, inasmuch as he is solely entitled to the entire assets and property of the company.

It may be that the Official Receiver will be put to a little additional expense if he does not get these books. That is really the whole point at issue. If any additional expense is involved, it ought not to be cast upon the Plaintiff, the only person having a beneficial interest.

It may be conceded that while the company is a going concern the directors could not lawfully part with the books; but in the case of a liquidation the right to the custody of the books most properly belongs to the person most nearly concerned in the due realization of the assets. In the present case that person is the Plaintiff, and the books are required by the receiver who is engaged in the collection of the debts.

With reference to the argument founded on sect. 7 of the Act of 1890, the very thing which it is suggested could not be done has in this case actually been done, for the statement required by the section has in fact been made.

KEKEWICH, J.:—

It is not the practice of the Court to determine questions of a purely academic character, as Mr. *Warmington* has described this case to be, and for the good reason that the Court sits to determine questions between parties to litigation, and not abstract questions which may be of interest to the public, but which it would be a waste of time to discuss when no person is really concerned in the determination of them. The Official Receiver, appearing here by counsel, admits that this particular application is of very little importance; but he says that there are other cases in which the same point arises, and that this is what is called more or less inappropriately a test case, and that the order of the Court in this case will be a guide to him in others.

I do not think I can properly resist the appeal so made to me. I have, therefore, to determine the question submitted on the application of the Official Receiver, coming here as the liquidator of the company, armed with the powers conferred upon him by the *Companies Act*, 1862, and subsequent amending Acts, and more particularly by the *Companies (Winding-up) Act*, 1890, which has given him not amended, but extended powers, and he says that he ought to have these books which are in the possession of the representative of the debenture-holders in this action of *Engel* v. *The South Metropolitan Brewing and Bottling Company*. The debentures are of a wide character, though I have seen them larger in terms, and practically it may be taken that these debentures are a charge on all the property of the company. Therefore everything, taking it generally, which came into the liquidator's hands is charged by these debentures, including uncalled capital, of which I am told there is none, and accordingly, regarding the debenture-holders as mortgagees and putting aside the statutory enactments, I should say they were entitled to take everything that belonged to the company, the books and papers among other things, and to put themselves in the position of proprietors of the company. But then the statutory enactments supervene, and the liquidator is bound to perform certain duties whether there is a fund for his remuneration or not, and whether there is a fund for payment of costs to his solicitor or not. Certain duties are imposed upon him which he

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is bound to perform, and they include the duties of preparing a list of contributories and a list of creditors, and I am not aware that the liquidator, however often it may be omitted, can forego the performance of his duty because there are no assets wherewith to pay the creditors, or money to be received from contributories. I do not think he can do that, without the authority of the Court, so as to render himself free from blame. For the purposes I have mentioned he must have the books of the company. Again, he is bound to make a report, and by the courtesy of the debenture-holder he has been enabled to do so in this case. But he could do it no doubt more conveniently if he had the books in his possession. He is also required to call meetings of creditors and contributories, and it may be he has under the sanction of the Court to examine witnesses, and for the purpose of instructing counsel he must make extracts from the books. He may probably have to do more than that; he may have to produce the books if necessary.

All these matters point to his having the books of the company, and particularly such as the minute-book of the directors, the share register, and other books which relate to the management of the company, and indicate how its business is carried on from day to day. Why should he not have them? Two reasons are given here. First, because the property belongs to the debenture-holders, or, as it happens, the one debenture-holder, the Plaintiff in the action. If they were title-deeds, I should hesitate very much to order the delivery of them to the liquidator. I call him the liquidator, because that unites more characters than Official Receiver. I should hesitate to make such an order as to anything like title-deeds, such as would be in ordinary course delivered over to a mortgagee. In the first place, I cannot see why it would be important to the liquidator to have them, and in the second place, it seems to me that it would be taking away from the mortgagee that which belongs to him and goes with his mortgage. But those considerations do not seem to me to apply to these other documents which are not of that character, which are more connected with the business than with the property of the company, and which are not necessary in order to support the title of the mortgagee, and to enable him to

uphold it if he is attacked. That, I think, is an answer to the first objection, dealing with these documents generally as the schedule enables me to do.

The other objection is of a different character. The receiver was appointed before the winding-up, that is to say, while the company was still a going concern, and he was appointed not with the consent of the company, but notwithstanding that they were served and were parties to the application, to be receiver and manager until judgment in this action or further order, on behalf of the debenture-holders, of all the property and assets of the company for the time being comprised in and subject to the securities, and there was an order for delivery over to such receiver and manager, of all books, leases, deeds, papers, and documents relating to the property and assets comprised in the securities. That order was made by the vacation Judge. It was not in any sense made by me, because at that time the action was attached to the Court of another Judge. It is said, that I cannot disturb that order. Of course I cannot, on the materials before me, discharge or reverse it; but what I can do, having both the action and the winding-up before me, is from time to time to make such order as is necessary for the custody of the documents in the proceedings and the liquidation.

An order of this kind is not binding on a Judge for ever. It would be entirely open to me, making such an order, to except from it, on the very next day, anything I thought it right to except for the purposes of the liquidation and the action, and I cannot conceive that I am hampered by that order in any way. But the management has now come to an end, and I take leave to doubt whether the order is right as regards the receiver only at any rate in more than a temporary way; I do not think the receiver could have wanted some of these documents, or that he wants them now. As manager, it was no doubt important that he should have them, and, if I may say so, the order was quite right as it stood at that time. But the business and management having come to an end, I do not think the receiver can want all of them any longer. That, however, is not the question which I have to decide. The question is, whose is the proper custody? I think the liquidator's is the proper custody, and I have no doubt he

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will give an undertaking to produce, at all proper times, on proper notice, any documents required by the receiver or by the Plaintiff in the action, for the purposes of the litigation; but subject to that and to any criticism on the schedule which has not occurred to me, as to any particular document which ought to be in the possession of the receiver as distinguished from the liquidator, I think the order ought to go as asked.

Solicitors: *Solicitor to the Board of Trade; H. Montagu.*

C. C. M. D.

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Feb. 4, 5.

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[1891 A. 374.]

Administration—Exoneration—Judgment Debt—Land delivered in Execution under Writ of Elegit—Locke King's Acts (17 & 18 *Vict. c.* 113 [*Revised Ed. Statutes, vol. xii., p.* 387]; 40 & 41 *Vict. c.* 34 [*Revised Ed. Statutes, vol. xviii., p.* 384]—*Judgment Acts* (1 & 2 *Vict. c.* 110, *s.* 13 [*Revised Ed. Statutes, vol. viii., p.* 370]; 23 & 24 *Vict. c.* 38, *s.* 1 [*Revised Ed. Statutes, vol. xiii., p.* 605]; 27 & 28 *Vict. c.* 112, *s.* 1 [*Revised Ed. Statutes, vol. xiv., p.* 976]).

Land which had been delivered in execution, under a writ of elegit, to judgment creditors of a testator, was specifically devised by the subsequent will of the testator:—

Held, that *Locke King's Acts* applied, and that the devisee was not entitled to have the land exonerated by the personal estate.

ADJOURNED SUMMONS.

By an indenture dated the 29th of April, 1846, the testator, *John Hollis Anthony*, mortgaged certain hereditaments in the parishes of *Boreham* and *Hatfield Peverell*, in the county of *Essex*, as security for £4000, with interest at £4 10*s.* per cent.

In pursuance of powers of sale contained in the mortgage, a part of the mortgaged hereditaments was subsequently sold by the mortgagees, and on the 16th of December, 1884, a balance of £1550 remained due on the mortgage.

On that day the mortgagees recovered judgment in the Queen's Bench Division against the testator for £1550 and £4 14*s.* costs, and such judgment was duly registered and re-registered.

On the 22nd of January, 1885, a writ of elegit on the judgment was duly issued to the sheriff of *Essex* to levy £1550 and £4 14*s.*, and interest on the £1550 at 4 per cent. per annum. By the inquisition of the sheriff and jury it was found that the real estate of the testator in the county of *Essex* consisted of a messuage and five acres of land, which the sheriff thereupon delivered to the mortgagees, who entered into receipt of the rents thereof, and continued in such receipt to the present time. They were also in possession of the unsold part of the mortgaged hereditaments.

The writ of elegit was duly registered under the *Land Charges Registration and Searches Act*, 1888 (51 & 52 Vict. c. 51).

By his will, dated the 7th of February, 1886, the testator, *John Hollis Anthony*, directed payment of his just debts, testamentary and funeral expenses, and continued as follows: "I leave unto my brother *William Hollis Anthony*, as my heir-at-law, my estate known as the *Grove Farm* at *Roxeth, Harrow, Middlesex*, now in the occupation of *Robert Baker*, and also my cottage, garden, land, and premises at *Boreham, Essex*, in the occupation of *J. W. Cliff*, as tenant entail, and I give to him, his heirs and assigns, my freehold house, garden, and orchard at *Chalfont St. Giles, Bucks*, which I inherited from my father." The testator then gave to his nephew *Edgar Solly Anthony* freehold property in the county of *Northampton*, freehold property in *Coggleshall, Essex*, which had been purchased by the testator, and freehold property in *Lincoln's Inn, Middlesex*, "subject to a mortgage thereon"; and to his sister *Hannah H. Anthony* freehold property in the city of *London* for her life, with remainder to his nephew *Edgar Solly Anthony*, and directed that the whole of his residuary real and personal estate should be sold and otherwise realized, and the proceeds divided equally into three parts, one of which he gave to his brother *Edward Hollis Anthony*, another to his nephew *Edgar Solly Anthony*, and the remaining third to *Louisa*, the widow of his late brother *Samuel Anthony*, and he appointed his nephews *Edgar Solly Anthony* and *Frederick Cattlin* (who predeceased him) executors of his will.

By a codicil dated the 26th of April, 1886, the testator gave his interest in certain freehold property in the city of *London*,

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and leasehold property in the county of *Middlesex*, to his nephew *Frederick Cattlin*.

The testator died on the 13th of February, 1890, and his will and codicil were proved on the 26th of March, 1890, by *Edgar Solly Anthony*, the surviving executor.

The property referred to by the testator as his cottage, garden, land, and premises at *Boreham, Essex*, in the occupation of *J. W. Cliff*, was the same as the messuage and five acres of land possession whereof was delivered to the mortgagees under the writ of elegit. The interest of the testator in the unsold part of the mortgaged hereditaments passed under the residuary gift contained in his will.

The testator's brother *William Hollis Anthony* survived him, but died intestate, leaving his son *Henry William Anthony* his heir-at-law.

This action was instituted by *Edward Hollis Anthony*, as Plaintiff, against *Edgar Solly Anthony*, the executor, as Defendant, for administration of the real and personal estate of the testator, and on the 23rd of June, 1891, an order was made directing the usual administration accounts and inquiries.

The mortgagees claimed £1685 as due to them for principal, interest, and costs, and *Henry William Anthony*, as heir-at-law of *William Hollis Anthony*, claimed to have the freehold estate at *Boreham, Essex*, devised to his father, assured to him free from incumbrance.

This was a summons taken out by the Defendant for the purpose of determining (*inter alia*) the question whether or not *Henry William Anthony* was entitled to have the estate so devised to his father exonerated from the judgment debt out of the personal estate of the testator.

Renshaw, Q.C., and *C. E. E. Jenkins*, for the Defendant, the executor, and for one of the residuary legatees, in support of the summons:—

We submit that the devisee of the land delivered under the writ of elegit took *cum onere*. The case is within *Locke King's Act* (17 & 18 Vict. c. 113), and the amending Acts, and in particular 40 & 41 Vict. c. 34, which extends *Locke King's Act* to every

case where land of a testator or intestate is "charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase money."

By 1 & 2 Vict. c. 110, judgments were made a charge on the land of the debtor, and by sect. 13 a judgment creditor was to have the same remedies as if the judgment debtor had, by writing under his hand, agreed to charge the land. The effect of that enactment was to convert a judgment from a general into an express or specific charge, and to make it in effect an equitable charge on the land: *Whitworth* v. *Gaugain* (1), *Rolleston* v. *Morton* (2). The later Acts of 23 & 24 Vict. c. 38, s. 1, 27 & 28 Vict. c. 112, s. 1, providing for registration of judgments, and that judgments should not affect the land until it was actually delivered in execution, were enactments passed for the protection of purchasers, and do not in any way impair the equitable charge conferred by 1 & 2 Vict. c. 110. In the present case that equitable charge has been perfected by actual delivery in execution pursuant to 27 & 28 Vict. c. 112.

Warrington, for *Henry William Anthony*, the heir-at-law of the specific devisee:—

I do not contend that there is apparent on this will any indication of a contrary intention to take the case out of *Locke King's Act* and the amending Acts, but that there is no charge within the meaning of those Acts. The provisions of those Acts have always been construed strictly. Thus a vendor's lien, although it is a charge created by the testator himself, was held not to be within the earlier Acts until it was expressly included by 40 & 41 Vict. c. 34. The argument on the other side involves the proposition that judgment debts are a primary charge on the real estate of the deceased debtor, a proposition which has never been suggested before, and is at variance with the established course of administration. The words of the Act 40 & 41 Vict. c. 34 are "mortgage or other equitable charge," and must be read as confined to charges by way of mortgage. There is an essential difference between such charges, which are

(1) 1 Ph. 728, 734, 735. (2) 1 D. & War. 171, 195.

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created by the voluntary act of the testator himself, and a charge which arises *in invitum* by operation of law. The charge created by 1 & 2 Vict. c. 110 is not an equitable charge within the meaning of *Locke King's Acts*, but a statutory charge, to which no doubt the Legislature, for the protection of the judgment creditor, and not with any object of disturbing the rights *inter se* of those claiming under the judgment debtor, attached the incidents of an equitable charge. But since the Act 27 & 28 Vict. c. 112, there can be no effectual statutory charge until the land is actually delivered in execution, and when that is done the writ of elegit creates an actual legal estate, that of the tenant by the elegit, who has a right to hold the land until the debt is paid. It is, therefore, a legal charge, and not an equitable charge or charge by way of mortgage, such as is referred to in 40 & 41 Vict. c. 34. The existence of the tenancy by elegit in no way affects the character of the judgment debt, which remains, as it was before, a debt payable in ordinary course of administration out of the general personal estate of the testator.

Vernon R. Smith, for the Plaintiff.

T. L. Wilkinson, for the mortgagees.

Renshaw, in reply:—

The estate by the elegit does not arise until the sheriff has delivered the land, and by means of it force and effect is given to the equitable charge which attached when judgment was entered up. 27 & 28 Vict. c. 112, s. 1, merely postpones the effect of the charge conferred by 1 & 2 Vict. c. 110, s. 13, and does not interfere with the charge itself.

[KEKEWICH, J., referred to *Hatton* v. *Haywood* (1) and *In re Cowbridge Railway Company* (2).]

Feb. 5. KEKEWICH, J.:—

The question in this case is whether a charge, which undoubtedly affects the land in question, is a charge within the

(1) Law Rep. 9 Ch. 229. (2) Law Rep. 5 Eq. 413.

meaning of that group of statutes which are known as *Locke King's Acts*, so as to throw the burden on the real estate, and not entitle the real estate to be exonerated by the personal estate. It is immaterial to trace the devolution of the charge, because the case was argued as being on all fours with the case where the present owner of the land was the devisee of the testator, who was also the debtor. It arises in this way: There is no mortgage, there is no equitable charge by deposit of deeds and memorandum, or any other act of the testator of that class. But he being a debtor, and having been sued and judgment having been obtained against him, the creditor has executed the judgment, has issued a writ of elegit, and has had the land delivered to him in execution by virtue of that writ of elegit, thereby calling into existence what is well known as an estate in the land. On that the question arises whether that is such a charge as is intended by *Locke King's Acts*.

Now, in the first instance it is necessary to consider what the nature of the charge is. Nobody denies that it is a charge; but the argument on behalf of the owner of the land is that it is not such a charge as is contemplated by *Locke King's Acts*. A judgment is made a charge by the statute of 1 & 2 Vict. c. 110, and if it had remained there, if there had been no amending statute, it would have been difficult to see how this could be said not to be a charge such as is within *Locke King's Acts*. Be that as it may, the argument is that the amending Act altered it.

Now, there were a series of amending Acts: they were all referred to more or less in argument, and I need not go through them; but it was thought that the statute merely making the judgment a charge did not operate satisfactorily, and so it was provided, first, that there should be a re-registration after a certain time—after every five years—so that it should be kept in force; and then ultimately by the Act of 27 & 28 Vict., that no judgment should affect any land until it should have been actually delivered in execution by writ of elegit, or other lawful authority, in pursuance of such judgment. On that arose a considerable difficulty whether anything but a legal estate could be delivered in execution. I do not think that I am now concerned to go into that discussion, except to point out that

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the course which authority has taken in expounding the statutes goes to shew that the intention was not to prevent the judgment having force as a charge, but *only to provide that so far as* possible the provisions of this Act should be followed, and *that* the charge should not come into effect until that had been done. I can hardly conceive how those cases could have been discussed and argued and decided as they were if it had been that the intention of the Legislature was that this should create a charge, or in any way repeal the Act. It seems to me to be only an addition to the Act of 1 & 2 Vict., and to say that the charge shall not affect the land until this has been done. Subject to that, the Act remains in full operation. Therefore, the position of the judgment creditor is still defined by the statute 1 & 2 Vict. c. 110, which provides that he "shall have such and the same remedies as if the judgment debtor had by writing under his hand agreed to charge the same." So that it is made not only a charge, but a charge as if by agreement. Why is that not within these statutes which are called *Locke King's Acts*? It may be—I think it is—quite possible that it was not within the earlier Acts. We all know that the first Act was a well meant but ineffectual endeavour to remedy the law as it then stood with regard to the administration of real as against personal estate, and it required more than one amending Act to bring it into the state of perfection which perhaps it may now be said to have reached. But at last we have a provision in the last amending Act which does bring within the operation of the Acts many things which were not there before, and among other things it is enacted that the previous Act "shall extend to any testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of whatever tenure" (those words having been necessary) "which shall at the time of his death be charged with the payment of any sum or sums of money." So far, there can be no doubt that this property was charged at the date of the death of the testator with a sum of money; but then it is to be charged "by way of mortgage or any other equitable charge, including any lien for unpaid purchase money." I do not think I need read further than that. It is difficult to read those words grammatically so as to give

them a thoroughly intelligible meaning. If they are to be read in this way: "With the payment of any sum or sums of money by way of mortgage or by way of any other equitable charge, including any lien for unpaid purchase money," that seems to me to be a somewhat unintelligible phrase, and I think we must find some other way of reading the words. I think it really must mean this: "Which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage or charge, or any other equitable charge, including any lien for unpaid purchase money." Then the strength of the argument in favour of the landowner comes in, that "any other equitable charge" implies the mortgage there mentioned. It must be equitable, otherwise it follows there would not be "any other equitable charge," and so this being a legal charge, is not included.

But the earlier Acts had already extended to legal charges, and this could hardly have been intended simply to sweep in such particular equitable charges as are mentioned or implied, and to exclude in any way a legal charge. I think I should be construing it narrowly by saying that a charge by way of mortgage excludes a charge such as this, whether it be legal or equitable. The words are perhaps not quite so happy as one might wish, and now, for the first time, somebody has found that they do not read quite so readily as you would expect after all this amendment. But I think the proper reading of it is that every sum which is charged on land by way of mortgage not effected by the testator, because it was done *in invitum*, but still in the sense that there is an equity of redemption, is brought within the Act. That includes this charge, which was a charge in this way, that there is a power of redemption—that is to say, the landowner only holds his property subject to the charge, and he can get rid of that charge, and can get the full possession of his estate, by means of paying the money and redeeming. It would be a narrow construction of an Act intended as an amendment Act if I were to say that it included equitable charges and did not include this because it is a legal charge; and although no doubt it is not a charge which conveyancers would describe as a charge by way of mortgage, I think that phrase is

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quite large enough to embrace this. Then this charge existing by force of the Act, and being of that character, I think it is swept in by the general words, and that the real estate must bear its own burden, according to the principle established by *Locke King's Acts.*

Solicitors: *Paterson, Snow, Bloxam, & Kinder; Shaen, Roscoe Massey & Co.; Torr & Co.; Venning, Sons, & Mannings.*

C. C. M. D.

In re B—— (AN ALLEGED LUNATIC).

C. A.
1892
Jan. 12.

Lunatic—Writ of Attachment—Compulsory Order for Examination—Jurisdiction of Master—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 94, *sub-s.* 2—*Lunacy Act,* 1891 (54 & 55 *Vict. c.* 65), *s.* 26, *Schel.*

A Master in Lunacy who is holding an inquisition of lunacy has power to order a writ of attachment to issue against an alleged lunatic for the purpose of enforcing his attendance; but in ordinary cases he ought to refer the matter to the Court in Lunacy.

THIS was an application by the husband of an alleged lunatic for a writ of attachment against her for the purpose of enforcing a compulsory order for her examination.

A petition had been presented by the husband for an inquiry into his wife's state of mind, and an inquiry had been directed.

On the 20th of July, 1891, the husband applied to the Court in Lunacy for a compulsory order for the examination of the lady, who had refused to attend voluntarily. This application was dismissed by the Lords Justices on the ground that the Master had not certified that there was any real necessity for a compulsory order to be made. At the same time their Lordships expressed their opinion that there was jurisdiction in the Master and in the Court to make such an order in case of necessity, but doubted whether the Master had power to enforce the order if made by him where there was no jury (1).

In consequence of this doubt a clause was inserted in the *Lunacy Act,* 1891 (54 & 55 Vict. c. 65), extending the powers of the Master. Sect. 26 is as follows:—

"(1.) The provisions of sect. 94, sub-sect. 2, of the principal Act (53 & 54 Vict. c. 5), as to the trial of issues in the High Court shall extend to all inquisitions, and the Masters may, for the purpose of inquisitions held before them, exercise the powers by that sub-section conferred on the Judge who tries the issue.

"(2.) The Master may make orders for the attendance of an alleged lunatic at such time and place as the order directs, for

(1) [1891] 3 Ch. 274.

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examination by the Masters or a medical practitioner, and such order may be enforced in the same way as an order of a Judge of the High Court."

By the schedule to the same Act the words "with a jury" in sect. 99 of the *Lunacy Act*, 1890, were repealed.

On the 29th of October, 1891, the Master who was conducting the inquiry made the following order: "I do order that, pursuant to sect. 26, sub-sect. 2, of the *Lunacy Act*, 1891, the above-named *C. E. B.* do attend at the room, &c., at the hour of two o'clock in the afternoon of Thursday, the 12th of November, 1891, for examination by Dr. *H. Maudsley*."

The lady was served with this order personally on the 9th of November, and its effect was explained to her by her solicitor, and she then promised to attend; but when the time for her attendance came she refused to present herself for examination.

The Petitioner now moved before the Lords Justices that a writ of attachment should issue against the alleged lunatic for contempt in disobeying the order of the Master. It was stated that the lady was at the present time abroad.

Lawson Walton, Q.C., and *Lyttelton*, in support of the application:—

Since the passing of the *Lunacy Act*, 1891, sect. 26, and the schedule, which struck out the words "with a jury" from sect. 99 of the Act of 1890, all doubt is removed as to the power of the Master to make the compulsory order and as to the power of the Court to enforce it, whether the inquisition be with or without a jury. The Master himself might have ordered the issue of the writ; but it was considered better in such a case to apply to the Court in Lunacy.

Costelloe, and *Colam*, for the alleged lunatic:—

This application is made to the wrong tribunal. It ought to have been made to a Divisional Court of the Queen's Bench Division. The *Lunacy Act*, 1890, provides by sect. 94, sub-sect. 1, that an inquisition by a jury in the lunacy of an alleged lunatic is to be tried by an issue in the High Court. In that case an application to enforce any order of the Court would have to be made

to a Divisional Court of the Queen's Bench Division, and that is the proper Court in the present case. The 26th section of the *Lunacy Act*, 1891 (54 & 55 Vict. c. 65), which enacts that the last-mentioned section shall apply to all inquisitions, and that the orders of the Master for attendance shall be enforced in the same way as an order of a Judge of the High Court, is only subsidiary to the section in the former Act. The Master has no jurisdiction to order a writ of attachment to issue. The order must be made by a Judge in open Court: *Davis* v. *Galmoye* (1); *Salm Kyrburg* v. *Posnanski* (2).

Lyttelton, in reply.

LINDLEY, L.J.:—

In this case an order has been made for an inquiry as to the soundness of mind of a lady who is an alleged lunatic. The inquiry has not been completed owing to the absence of the lady; and the Master in Lunacy, finding that he could not go on with the inquiry, made the order of the 29th of October, 1891, under the powers of sect. 26, sub-sect. 2, of the *Lunacy Act*, 1891, by which he ordered that she should attend on the 12th of November, 1891, to be examined by a medical man. That order was personally served on her on the 9th of November, and she then said she would attend; but afterwards, for personal reasons, she refused to attend. The question is, what is to be done to enforce the order of the 29th of October. This Court has been applied to to issue a writ of attachment, and the question is whether that is the proper method of enforcing the order. The only method of enforcing such an order that I know of is by a writ of attachment; and the real question here is who has the power of ordering the writ to be issued. Until the Act of 1891 was passed there was some obscurity as to the power of the Master to enforce his orders, as was shewn by a proceeding in this very lunacy, which has been reported: *In re B*—— (3). In consequence of that case, sect. 26 was introduced into the *Lunacy Act*, 1891. There, by the schedule to that Act, the powers of the person executing

(1) 39 Ch. D. 322. (2) 13 Q. B. D. 218.
(3) [1891] 3 Ch. 274.

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an inquisition of Lunacy were enlarged by striking out the words "with a jury" in sect. 99 of the Act of 1890. It appears, therefore, to me to follow that the Master in Lunacy has himself the power to issue an attachment to enforce any order which he has power to make. Then sect. 26, sub-sect. 2, of the *Lunacy Act*, 1891, gives the Master power to make an order requiring the person whose sanity is being inquired into to attend for examination by himself or a medical practitioner. Combining, therefore, sect. 26 of the Act of 1891 with sect. 99 of the Act of 1890, as modified by the schedule of the Act of 1891, it appears to me clear that the Master has himself jurisdiction to order an attachment in the present case. As a matter of convenience and discretion, however, it is desirable that the Master should refer such applications to this Court, in order that a matter involving the liberty of the subject may be dealt with judicially in open Court. That was the practice indicated with regard to applications for attachment in the High Court of Justice in *Davis* v. *Galmoye* (1). We do not hold that the Master cannot himself direct the writ to issue—he has jurisdiction to do so; but we think that it is better for him to refer the matter to this Court, unless the case should be an exceptional one.

I cannot accede to the argument of the Respondent's counsel, that the application for an attachment ought to be made to a Divisional Court of the Queen's Bench Division. That would be introducing an altogether novel procedure in Lunacy.

With respect to the present case we have seen the Master; and he assures us that in his judgment it is not possible to carry out the inquiry without the examination of the lady by a medical practitioner. The lady must, therefore, submit to the order for her attendance. Consequently, the writ of attachment must issue; but as there is some doubt whether she is within the jurisdiction, and we do not wish to put her to needless inconvenience, the writ will be ordered to lie in the office for a fortnight, if the lady is now in *England*, or for a fortnight after her return to *England* if she is abroad, so that she may have an opportunity, if she so desires, of coming to the Court in the meantime. She must pay the costs of this application.

(1) 39 Ch. D. 322.

LOPES, L.J.:—

This case involves an important question as to the jurisdiction of the Masters in Lunacy. The 99th section of the *Lunacy Act*, 1890, is amended by the schedule of the *Lunacy Act*, 1891, by striking out the words "with a jury," and, in my opinion, that is enough to give the Master jurisdiction in this case; but it is made more clear by sect. 26, sub-sect. 2, of the last-mentioned Act, which says that "the Masters may make orders for the attendance of an alleged lunatic at such time and place as the order directs, for examination by the Masters or a medical practitioner, and such order may be enforced in the same way as an order of a Judge of the High Court." I have, therefore, no doubt that the Master had jurisdiction to make the order now applied for, although I agree it is better for him to refer it to the Court. The Divisional Court of the Queen's Bench Division has no jurisdiction in Lunacy; this Court is the proper tribunal to make the order. I agree in the form of the order which is proposed.

KAY, L.J.:—

I am of the same opinion. If the question had turned simply upon the words of sect. 26, sub-sect. 2, of the Act of 1891, I should have thought that the Master was not authorized to order a writ of attachment to issue; but, looking at sect. 99 of the Act of 1890, as amended by the schedule of the Act of 1891, one cannot resist the conclusion, that where the Master has made an order for the attendance of an alleged lunatic he has the power to enforce that order by ordering an attachment. But I agree that, except in pressing cases, he ought to refer such a matter to the Court in Lunacy. Order XLIV., rule 2, of the Rules of the Supreme Court, says, that "no writ of attachment shall be issued without the leave of the Court or a Judge, to be applied for on notice to the party against whom the attachment is to be issued." When the rules say "the Court or a Judge," it is understood that "the Court" means a Judge or Judges in open Court, and "a Judge" means a Judge sitting in Chambers. Therefore, by the very terms of this rule, a writ may be issued, not only by a Judge in open Court, but by a Judge sitting in Chambers also.

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In *Davis* v. *Galmoye* (1), the Court of Appeal held that a Judge sitting in Chambers had a discretion either to issue the writ or to adjourn the case into Court, but that it is better in ordinary cases to adjourn it into Court. That seems to me to indicate the course which the Master in Lunacy ought to pursue; he ought in ordinary cases to exercise his discretion by referring them to the Court in Lunacy.

LINDLEY, L.J.:—

The order will be that the writ of attachment against the Respondent will issue, but will lie in the office for a fortnight from this day if she is in England, and if she is abroad for a fortnight after she shall return within the jurisdiction. The Respondent to have leave to apply at any time to one of the Judges of this Court; the Respondent to pay the costs of this application, but execution to enforce the costs to be stayed till the conclusion of the inquiry.

The lady, after her return to England, saw one of the Lords Justices, and consented to see a medical expert approved by her and the Lord Justice.

Solicitors: *Irvine, Hodges, & Borrowman; Lickorish & Bellord.*

(1) 39 Ch. D. 322.

M. W.

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[1866 P. 157.]

Minerals wrongfully taken—Compensation—Interest—Trespass—Money had and Received—Account—Claim for Interest made on further Consideration —Delay—3 & 4 Will. 4, c. 42, s. 29 [Revised Ed. Statutes, vol. vii., p. 415] —1 & 2 Vict. c. 110, ss. 17, 18 [Revised Ed. Statutes, vol. viii., p. 372].

By the decree made in this suit in 1870, it was declared that the Defendants *S. H.* and *R. F.*, and the estate of the deceased Defendant *W. H. F.*, were answerable for all minerals gotten or removed from under the Plaintiffs' farm; and an inquiry was directed what quantities of minerals had been so gotten or removed, and it was ordered that the value at the pit's mouth of all minerals so gotten or removed, with just allowances for carriage, but none for getting, should be certified. The decree was silent as to interest, no claim for interest being made at the hearing.

After the decree the Defendants *S. H.* and *R. F.* died, and the suit was continued, so far as the inquiry was concerned, against their representatives.

The Official Referee having, in December, 1889, reported the value at the pit's mouth of the minerals taken to be £9028 6s., the Plaintiffs, upon the further consideration of the suit in 1891, claimed to be entitled to damages in the nature of interest on that amount on the ground that the action was in the nature of an action of trover or trespass *de bonis asportatis* within sect. 29 of 3 & 4 Will. 4, c. 42.

Held, that the action must be treated as an equitable action to recover the benefits that the Defendants or their respective estates had received from the wrongful taking of the minerals belonging to the Plaintiffs, and not as an action of trover or trespass; and that, although according to the settled practice in the case of such an equitable action, the Plaintiffs might, at the hearing, have been allowed interest on the value of the minerals wrongfully taken, yet, the Plaintiffs not having claimed interest at the hearing and the decree being silent as to interest, it was too late to claim it for the first time twenty years after the date of the decree.

Decision of *Stirling*, J., affirmed.

In an equitable action to recover from the estate of a deceased person the profits he has received from a wrongful act, such as taking coal belonging to the plaintiff, the Court will, at the trial, make the estate liable, not only for the amount of profits actually received, but also for interest thereon at 4 per cent. from the death of the wrongdoer: *Duke of Leeds* v. *Lord Amherst* (1).

APPEAL from Mr. Justice *Stirling* (2).

Hastings, Q.C., and *F. T. Procter*, for the Plaintiffs, the Appellants:—

This proceeding is in the nature of an action of trover or

(1) 14 Sim. 357, 367; 2 Ph. 117. (2) 44 Ch. D. 694.

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trespass: *Martin* v. *Porter* (1); *Wood* v. *Morewood* (2); and, therefore, interest may be given under sect. 29 of the statute 3 & 4 Will. 4, c. 42, which says, "that the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*." The Judge below thought that the proceeding was in the nature of an action for money had and received, so that the section did not apply; but we contend that this view was erroneous: *Hambly* v. *Trott* (3); *Bishop of Winchester* v. *Knight* (4); *Baily* v. *Birtles* (5). The cases in equity are referred to in a former report of this case (6).

[LINDLEY, L.J., referred to *Powell* v. *Rees* (7), where an administrator was held liable to an action for money had and received by the intestate for coal wrongfully taken.]

The principle upon which we ask the Court to proceed in this case is that, where an injury is to be compensated by damages, in settling the sum to be given for reparation of damages, you should, as nearly as possible, get at the sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation: *Jegon* v. *Vivian* (8); *Livingstone* v. *Rawyards Coal Company* (9); *Dreyfus* v. *Peruvian Guano Company* (10).

The claim in this action was founded entirely on trespass, and the deaths of the Defendants during the progress of the action cannot alter the principle upon which the Court acts, they having been proved to have been guilty of a fraudulent concealment of their acts: *Garth* v. *Cotton* (11). All that we have got hitherto in this action has been founded on trespass; and this, we submit, entitles us under sect. 29 of 3 & 4 Will. 4, c. 42, to damages in the nature of interest upon the principle above stated.

(1) 5 M. & W. 351.
(2) 3 Q. B. 440, n.
(3) 1 Cowp. 371, 377.
(4) 1 P. Wms. 406.
(5) Sir T. Raym. 71.
(6) 24 Ch. D. 439.
(7) 7 Ad. & E. 426.
(8) Law Rep. 6 Ch. 742, 760.
(9) 5 App. Cas. 25, 39.
(10) 42 Ch. D. 66, 76–7; 43 Ch. D. 316.
(11) 1 Dick. 183, 217.

[LINDLEY, L.J.:—In the recent case of *London, Chatham and Dover Railway Company* v. *South Eastern Railway Company* (1), interest was disallowed.]

That was entirely a case of contract.

[KAY, L.J.:—The Plaintiffs here might have claimed interest on the same principle as in *Duke of Leeds* v. *Lord Amherst* (2), which was a case of equitable waste. Where you bring an action against the executors of a deceased man for wrong done in his lifetime you can get interest from his death.]

We rely upon that case as an authority in our favour. This is also a case of equitable waste.

[LINDLEY, L.J.:—After the decisions in *Garth* v. *Cotton* (3) and *Duke of Leeds* v. *Lord Amherst*, you may take it that the general rule is to give interest in a case of equitable waste.

LOPES, L.J.:—In both those cases it must be noticed that interest was asked for and payment ordered by the decree.

LINDLEY, L.J.:—Supposing you are entitled to interest, how much arrears do you ask?]

From the 9th of May, 1870—the date of the decree.

[LOPES, L.J.:—If you are entitled to interest at all, you were entitled to it then. If you did not ask for it then, that was laches on your part. To come and ask for it after a lapse of twenty-one years seems impossible. Is there any precedent for such a demand being acceded to after so long a period? or is there any explanation as to why interest was not included in the original decree?

LINDLEY, L.J.:—You have not got it in the decree, and you are now asking us for some benefit as if the decree gave it to you.

KAY, L.J.:—Your answer, I suppose, is that the wrongdoers have got the money in their pockets, and that you are only asking for the fruits of their wrongdoing.]

Yes. And further, we rely upon sects. 17 and 18 of the statute 1 & 2 Vict. c. 110, as giving us interest—a point which was not

(1) [1892] 1 Ch. 120. (2) 14 Sim. 357, 367; 2 Ph. 117.
(3) 1 Dick. 183.

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taken in the Court below. We submit that the original decree declaring that the Defendants were liable to us for the value of the coal gotten by them was a "decree or order of a Court of Equity" within sect. 18, entitling us to interest from the date of the decree at at least 4 per cent. on the value when ascertained. The fact that the amount payable to us was not ascertained until after the date of the decree is immaterial: it is well settled that costs carry interest under those sections from the date of the decree, though not ascertained until afterwards, and we submit that a similar rule should be applied here. With regard to the point of delay, that is accounted for by the numerous steps from time to time taken in the litigation since the original decree, the Official Referee not having made his report upon inquiry No. 1, finding the capital sum of £9028 6*s.* to be due to us, until so recently as the 2nd of December, 1889.

As to the point that interest was not asked for at the time the decree was made, that, we submit, did not debar us from asking for it at a future stage. Interest has been given on further consideration or further directions: *Meredith* v. *Bowen* (1).

[KAY, L.J.:—In that case it was given on the ground of a contumacious refusal to pay a debt. That entitles to interest at law. There is no doubt that the Court can grant interest on further consideration. The question is whether, after delay, it ought to do so.]

In *Marsh* v. *Jones* (2) interest was given by way of damages on a motion made after the report of the Official Referee directed by the judgment, although at the trial interest was not asked for, nor any question raised as to it.

We submit that, having regard to the fraudulent conduct of the Defendants and to the fact that for twenty-five years they have had this sum of £9028 6*s.* in their pockets, and no doubt have employed it in their trade, they ought to account to us for all the benefit and profit, including interest, they have derived from their wrongdoing.

Rigby, Q.C., and *Sangster Green*, for the Respondents, the

(1) 1 Keen, 270. (2) 40 Ch. D. 563.

legal personal representatives of the Defendants *Forman* and *Homfray*, and

Buckley, Q.C., and *Osler*, for the Respondents, the legal personal representatives of the Defendant *Fothergill*, were not called upon.

LINDLEY, L.J.:—

This is an appeal from a decision of Mr. Justice *Stirling*; and it raises the question whether the Plaintiffs are entitled to interest on a sum of £9028 6*s*., representing the value of coal improperly got by the Defendants in working minerals under the Plaintiffs' land. The form of the decree made in the action is important. The decree as made at the trial was varied by the Court of Appeal, and is set out in 44 Ch. D. (pp. 694, 695); and I will read it. [His Lordship then read the declaration and the inquiry No. 1, and proceeded:—]

Then there were other inquiries which we need not trouble ourselves with. The first inquiry has been answered at last. There has been considerable delay, for it is only now that that inquiry has been answered. The result is that, some twenty years after the date of that decree, it is now ascertained that a sum of £9028 6*s*. is due from the Defendants to the Plaintiffs upon inquiry No. 1. Now the question arises whether the Plaintiffs are entitled to interest on that sum from the date of the decree. In order to determine that question we must see on what principle the decree is based. The matter does not come before the Court for the first time, for it was discussed at considerable length at another stage of the action which is reported in 24 Ch. D. (p. 439); but there are one or two things which strike one at once on the face of this decree. In the first place, the decree was made not only against two Defendants who were then alive, but also against the executors of a deceased Defendant, named *Forman*. That shews conclusively to my mind that this decree was not based upon the theory that this was an action of trover or trespass, because an action of trover or trespass could not have been maintained at law against the executors of *Forman*.

Then after the decree, and while the inquiries under it were

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pending, one of the other Defendants named *Fothergill* died, and thereupon the action was revived against his executrix; but if this had been an action of trover or trespass it could not have been continued against his executrix. Therefore the decree must have proceeded on the theory that this was an equitable action for an account—an action to make the Defendants account for the profits they had made out of the trespass they had committed. It is analogous to the cases of *Bishop of Winchester* v. *Knight* (1), and *Duke of Leeds* v. *Lord Amherst* (2), according to which an action may be maintained for an account. The distinction between an action of this nature and an action for trover or trespass was pointed out by the Court of Appeal in the report of this very case in 24 Ch. D. (p. 439).

The action then being an action for an account, on every principle of Equity the action itself was perfectly right, the decree was perfectly right, and the orders for revivor were right. But this shews that the Plaintiffs cannot bring their case within the 29th section of the statute of 3 & 4 Will. 4, c. 42. If the action had been an action of trover or trespass within that section, it could not have been continued against the executors of *Forman*. Even the analogy of the statute does not apply, for this action could not be maintained upon the theory that it is like a Common Law action for a tort. Therefore, without discussing the language of the 29th section critically, the claim of the Plaintiffs, so far as it is based on that enactment, is displaced by the nature of this action and by the nature of the relief granted.

Then, again, this action is not an action for money had and received. The Defendants are not required to account for what they have received, but for the value of the coal raised —that is to say, the market price or value after making just allowances. Therefore we get out of the analogy of an action for money had and received. But even if this were an action for money had and received I do not think it would assist the Plaintiffs, because the conditions required by sect. 28 of the statute have not been complied with. Therefore I agree with Mr. Justice *Stirling* in the conclusion at which he has arrived.

(1) 1 P. Wms. 406. (2) 14 Sim. 357; 2 Ph. 117.

If the Plaintiffs are entitled to interest at all, they are entitled to it on a different footing. Considering the principle on which the Court acted in *Garth* v. *Cotton* (1) and *Duke of Leeds* v. *Lord Amherst* (2), I am not prepared to say that it is wrong to decree interest on an account for equitable waste; that is a point I should like to consider; the analogy between an account in a case of equitable waste and an account of minerals improperly worked is very close. But we have not to consider that question here, because the decree does not contain any direction as to interest. That decree was made in 1870; there was no appeal from it on the question of interest; and although there has been endless litigation between the parties, there has not been any appeal as to this particular inquiry No. 1. The Plaintiffs might at any time, with regard to that inquiry, have asked the Court to make an addition to the decree providing for interest; they might have made an application for the purpose, and might possibly have obtained that addition, but they did nothing of the kind; and now we are asked, more than twenty years after the date of the decree, to treat it as if it contained that addition. I do not think that is right; it seems to me that this delay is a fatal answer to the Plaintiffs' claim. I agree entirely with what Mr. Justice *Stirling* said on this point. It is true he does not appear to have had his attention called to such cases as *Garth* v. *Cotton* and *Duke of Leeds* v. *Lord Amherst*, on the doctrine of equitable waste, but, nevertheless, his observations are extremely important. Even assuming that the Plaintiffs might have got interest at the time the decree was made, it would be unjust to give them interest at this distance of time.

In my opinion the view of the learned Judge was right, and the appeal must be dismissed with costs.

LOPES, L.J.:—

I am of the same opinion. I express no opinion as to whether, if the circumstances had been different, interest might not have been recoverable, but we must look at the decree and see what this decree is. The relief granted is not such as would be granted in an action of trover or trespass. If this were an action

(1) 1 Dick. 183. (2) 14 Sim. 357; 2 Ph. 117.

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of that nature, the maxim "*Actio personalis moritur cum personâ*" would apply. It seems to me that, as the relief granted was not granted on the ground either of trover or trespass, s. 29 of the statute 3 & 4 Will. 4, c. 42, does not apply.

Then, is the effect of the decree the same as that of a decree in an action for money had and received? In my opinion it is not. It was suggested in the course of the argument at another stage of this case (1) that the action might be treated as an action for use and occupation, but it is clear that that cannot be so, because such an action will not lie where there has been a trespass. Such an action rests upon an implied contract that presumes use and occupation by the leave and license of the Plaintiffs.

What, then, is the effect of the decree? In my opinion the relief given by the decree is such as would be granted if the action were an equitable action for an account; it is such relief as would be granted where the estate of a deceased wrongdoer had been added to by what had been done. If that had been so, I am not prepared to say that interest might not have been successfully claimed, in the first instance, on the principle of *Garth* v. *Cotton* (2) and *Duke of Leeds* v. *Lord Amherst* (3), but it is unnecessary to decide this question. The ground of my decision here is this, that this decree was obtained in 1870, and the application before us was made in 1891, that is to say, after a lapse of more than twenty years. It is perfectly clear that, if interest could have been recovered, it might have been asked for at the trial in 1870, and might have been inserted in the decree then made. It was not asked for, nor was it inserted in the decree. I think that, having regard to the lapse of time, it is too late now to come and ask the Court to insert in the decree that which was not inserted in it in 1870. That was the ground upon which Mr. Justice *Stirling* proceeded, and, in my opinion, he was right.

KAY, L.J.:—

I agree that this action cannot be treated as an action of trover or trespass *de bonis asportatis*, after the decision of the Court of

(1) 24 Ch. D. 439. (2) 1 Dick. 183.
(3) 14 Sim. 357, 2 Ph. 117.

Appeal (1). The question there decided was whether the action could be continued against the representatives of a Defendant who had died. When the decree was made, three of the persons who had wrongfully taken coal under the Plaintiffs' land were living, but one was dead, and the decree, though in the form of a decree for damages for wrongfully taking the coal, was made against living persons and against the representatives of a person who was dead. Clearly, therefore, the action was not treated as an action of trover or trespass, because no such action could have been brought against the representatives of a man who was dead. Then, what was the action? The elaborate and considered judgment of the Court of Appeal (2) shews exactly what the action was.

The Court treated the action as an action against the estate of a deceased man, to recover from that estate what the estate had received from coal wrongfully gotten, and such an action could be brought in a Court of Equity, because, if the estate was increased by a tort in the man's lifetime, you could make the estate liable for the benefit received through the tort. Therefore I treat this as an action, not of trover or trespass *de bonis asportatis*, but as an action to recover from the estate of a deceased person and from three other persons who were living, the benefit they had received from wrongfully taking coal belonging to the Plaintiffs. The effect of the decree made in the action was that the value of the coal should be recovered. The Defendants were persons trading in coal, and beyond all question they must have received the market value of the coal because they got it to sell, and sold it. The form of the decree is entirely consistent with the claim against the Defendants for the benefit their respective estates had received through their wrongful acts. I agree that where a claim of that sort is brought, it has long been the practice in equity to make the estate of a deceased person liable, not only for the amount he has received, but also for interest thereon at 4 per cent. In the well-known case of *Duke of Leeds* v. *Lord Amherst* (3), a claim was made by the plaintiff, the Duke, against the estate of his father, the late Duke, for compensation in respect of acts of

(1) 24 Ch. D. 439. (2) 24 Ch. D. 453, *et seq.*
(3) 14 Sim. 357.

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equitable waste. I have before me the decree, which commenced as follows (1): "Declare that the personal estate of the late Duke is liable to account, to the plaintiff, for all the benefit and profits received, by him, from or by means of the acts of equitable waste complained of in the bill, and committed by him on the family estate at *Keeton*, with interest on the amount at £4 per cent. per annum, from the 10th of July, 1838, the day of the late Duke's death." The judgment shews that this declaration as to interest was carefully inserted, because the Vice-Chancellor (2) not only says that the estate of the late Duke must account for interest on the profits he had received from his acts of equitable waste, but fixes the rate of interest. That case was argued by Mr. *Bethell* and other leading counsel in equity of that day; and although it went on appeal before the Lord-Chancellor (3), the question of interest never seems to have been raised; and, as has been already pointed out by my learned brethren, where a man is made liable in equity on the ground that he has received benefit from a wrong committed by him, interest has always been allowed on the amount for which he has been found liable. Therefore, if this claim for interest had been made at the time when the decree was made, the Plaintiffs might have obtained against the representatives of the Defendant who had died an order for payment of the amount of the benefit their estate had received, and also of interest at 4 per cent.; but interest was not asked for. The dates are these. The original decree was made on the 9th of May, 1870, and varied by the Court of Appeal on the 30th of June, 1871. The application to allow interest was not made until April, 1890. The laches of the Plaintiffs in not making that application for twenty years has not been satisfactorily accounted for; and the litigation which went on subsequently to the date of the decree shews that the inquiry as to the quantity of coal wrongfully gotten has not been interfered with in any way from the date of the decree down to the present time, and except in the case of the application made for interest before Mr. Justice *Stirling*, the Plaintiffs have made no claim whatever for interest.

(1) 14 Sim. 367. (2) 14 Sim. 366.
(3) 2 Ph. 117.

I agree that the laches of the Plaintiffs in that respect disentitles them to make any such claim now. No doubt the Court might have given interest on the former occasion, but having waited for twenty years, when the decree did not contain any direction as to interest, it was difficult to obtain such a direction when the action came on for further consideration twenty years afterwards. Therefore, whether the Plaintiffs would have been entitled to interest or not if they had asked for it at the trial—and upon that point I am inclined to be in their favour—I am of opinion, having regard to their delay in asking for it, that they are not now entitled to have it, and that the appeal should be dismissed, with costs.

Solicitors: *Ullithorne, Currey, & Villiers, for Simons & Plews, Merthyr Tydvil; T. W. Denby; Field, Roscoe & Co.*

G. I. F. C.

DUKE OF SUTHERLAND *v.* HEATHCOTE.

[1890 S. 980.]

Deed—Construction—Reservation of Right to get Minerals—Right, whether Exclusive—Setting aside Lease.

Earl *G.* and Viscount *T.*, the Plaintiff's predecessors in title, having a general power of revocation and new appointment over lands of which they were respectively tenant for life in possession and tenant for life in remainder, by a deed of exchange in 1783 appointed and granted the lands to the Defendant's predecessor in title in fee, saving and reserving nevertheless to Earl *G.* and Viscount *T.*, their heirs and assigns, full and free liberty to get the coal and minerals which should be found within the lands. The minerals were never worked under this reservation by the Plaintiff or his predecessors in title. In 1865 the then owner of the lands demised the coal under part of them to persons whose interest became vested in the Defendants *B. & B.*; and in 1877 the Defendant *H.*, who had succeeded to the ownership of the lands, demised the coal under another part to the Plaintiff. Some years after this the Plaintiff first became aware of the reservation in the deed of 1783, and brought his action to establish his right to the minerals, to restrain the Defendants from working them, and to have the lease of 1877 rectified or set aside:—

Held, that the reservation in the deed of 1783 did not operate as an exception of the minerals, but only as a grant by the Defendants' predecessor in title of a right to work them; that there was nothing to shew

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that this right was to be exclusive; and that, therefore, it did not prevent the landowner from working them, provided he did not disturb the grantee in any working which the grantee was carrying on; and that the Defendants, therefore, had not infringed the Plaintiff's rights:

Held, further, that the lease of 1877 could not be rectified, as there was no common mistake, and that it could not be set aside as the Plaintiff was not prepared to give up possession of the property comprised in it.

Decision of *Vaughan Williams*, J. (1) affirmed.

THIS was an appeal by the Plaintiff from a judgment of Mr. Justice *Vaughan Williams*, dismissing the action. The case is reported [1891] 3 Ch. 504, where the facts will be found fully stated.

In 1781 certain estates were settled on Earl *Gower* for life, with remainder to Viscount *Trentham* for life, with divers remainders over, subject to a joint power of revocation and new appointment given to them. In October, 1783, in order to effectuate an exchange with Mr. *Heathcote*, they by a deed which recited that they were seised in fee of certain lands, and Mr. *Heathcote* of certain other lands, and that they had agreed to exchange them, and then recited the settlement of 1781, granted and appointed a part of the said lands to Mr. *Heathcote*, his heirs and assigns: "Saving and reserving nevertheless to the said *G.*, Earl *Gower*, and *G. G.*, Lord Viscount *Trentham*, and to their heirs and assigns, full and free liberty by all necessary ways and means to search for, get, dig, drain, and carry away, the coal, ironstone, and minerals which may or shall be found within the several lands hereby granted and exchanged from them, the said Earl *Gower* and Lord Viscount *Trentham*, to the said *J. E. Heathcote*, his heirs and assigns, and also to drive any sough, level, or gutter through the same lands to any other lands or grounds of them the said Earl *Gower* and Lord Viscount *Trentham*, or either of them, making satisfaction for all damages to be done or occasioned by the use or exercise of any of the privileges aforesaid; to have and to hold all and singular the said messuage or tenement lands and premises (saving and except as aforesaid) unto the said *J. E. Heathcote*, his heirs and assigns, to the only proper use and behoof of the said *J. E. Heathcote*, his heirs and assigns, for ever."

(1) [1891] 3 Ch. 504.

The Plaintiff was the successor in title of Earl *Gower* and Viscount *Trentham*. The Defendant *Heathcote* was the successor in title of Mr. *Heathcote*, the party to the deed of 1783.

Neither the Plaintiff nor his predecessors in title had ever worked the mines under the above reservation, the existence of which had been forgotten.

In 1865, the immediate predecessor in title of the Defendant *Heathcote* granted a lease of part of the mines under this property to a lessee, whose interest was now vested in the Defendants *Blair & Bird*.

On the 4th of January, 1877, the Defendant *Heathcote* granted to the Plaintiff a lease for forty years of the mines under the rest of the property.

In 1890, the Plaintiff brought his action against *Heathcote* and *Blair & Bird*, asking for a declaration that he was entitled to the mines under the lands which his predecessors in title had conveyed by the exchange deed of 1783; for an injunction to restrain the Defendants from working them, and to have the lease of the 4th of January, 1877, set aside or rectified. Mr. Justice *Vaughan Williams* having dismissed the action, the Plaintiff appealed. The arguments as to the *Statute of Limitations* are omitted, as the Court did not pronounce any judgment on that point.

Rigby, Q.C., *Neville*, Q.C., and *Hadley*, for the Appellant, the Duke of *Sutherland*:—

The recital in the deed of exchange of the 30th of October, 1783, that the grantors, Earl *Gower* and Viscount *Trentham*, were seised in fee, operated as an appointment by them in their own favour, and gave them the fee in the lands comprised in that deed, including the minerals thereunder: *Poulson* v. *Wellington* (1); *Rowbotham* v. *Wilson* (2); and the deed then proceeded upon the footing that the grantors were absolute owners—using language appropriate to grantors in fee, and not to appointors. The minerals being thus vested in the Earl and the Viscount, the liberty of getting and working such minerals was by the same deed reserved to them, their heirs and assigns. The decision we appeal from is that this was only a license by Mr. *John*

(1) 2 P. Wms. 533. (2) 8 H. L. C. 348.

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E. Heathcote, with whom the exchange was effected, to get such minerals under the lands as he did not himself take.

[FRY, L.J.:—*Primâ facie* liberty to do a thing is not exclusive liberty.]

Even assuming that this is not an exception but a license, the liberty is not for a limited quantity or a limited time. It is not a liberty to get coal, but to get "the" coal. The consideration is not one arising from time to time, like a royalty; but it is an executed consideration given once for all; the license is a license limited in fee simple to get the whole of the minerals; and it would be derogating from the terms of it if the grantor were to take a single ton; he has parted with the whole for ever. So that which is in terms only a liberty must be treated as a conveyance of the whole; for it is apparent that the grantor of the liberty intended to give up all his beneficial interest in the property and to pass it to the grantee. *Duke of Hamilton* v. *Dunlop* (1), where the owner of lands conveyed, reserving the "liberty of working the coal," is an authority which goes the whole length of our contention on this point, and on it we strongly rely. The "liberty" was in fact a grant, and a grant of minerals involves that which is necessary to make the grant efficacious—*i.e.*, the power for the grantee to get them: *Earl of Cardigan* v. *Armitage* (2). We say that the whole deed must be taken into consideration. The Earl and the Viscount first appointed to themselves in fee, and then as owners of the fee granted. The appointment was made under their power, and the intention was to take the whole property comprised in the deed, lands and minerals, out of the settlement, and to vest it in the Earl and the Viscount as joint tenants in fee simple for their own advantage. It was in their power to put an end to the settlement, and in this respect they did so. Our title is, however, the same, whether we take under or against the settlement. The deed could operate as a grant; but it is enough if it operates as an appointment. The deed may again operate thus: (1.) As a release, which would be effectual, because there was evidence to shew that actual possession of the lands exchanged was delivered

(1) 10 App. Cas. 813. (2) 2 B. & C. 197.

to Mr. *J. E. Heathcote* some two or three years before the deed; and (2.) as a Common Law exchange.

Treating the transaction as a whole, it was a putting of the fee in the Earl and the Viscount, in order that it might be partially, and partially only, taken out of them; for it is plain that they did not intend the minerals to go to *J. E. Heathcote*, and the intention governs everything. "Saving" means the same thing as "excepting"—that is, "*præter*" or "*salvo*."

Lord Mountjoy's Case was relied on by counsel for the Defendant in the Court below, and they cited it from the reports of *Leonard* (1) and *Godbolt* (2), as an authority that a grant in fee of a liberty to get coals cannot confer an exclusive right to such coals. But the only authentic report of the case is that in *Anderson* (3). *Lord Mountjoy's Case* was decided in 1582. *Anderson*, C.J. (4), the author of those reports, was himself one of the Judges who took part in its decision; and in his report of the case there is nothing to shew that it can properly be used in support of any such proposition.

The truth is that, somehow or other, several points which, according to *Anderson's* report, were never decided in *Lord Mountjoy's Case*, were inserted in the collection of reports made by *Leonard* and *Godbolt*, and that no report of *Lord Mountjoy's Case*, except that in *Anderson*, can be relied on.

As to our never having worked the minerals, mere non-exercise of a right is not abandonment of it; and our claim is not barred by laches or delay, or by the *Statute of Limitations*: *Seaman* v. *Vaudrey* (5); *Smith* v. *Lloyd* (6); *Neill* v. *Duke of Devonshire* (7).

(1) 4 Leon. 147.

(2) Godb. 17.

(3) 1 And. 307.

(4) *Anderson*, C.J., died in 1605, and his reports were published in 1664.

Leonard died in 1615. *Leonard's* Reports were not published by him, but by *William Hughes*, who translated them from the French of *Leonard's* MSS. The fourth part was first published in 1675, long after the other parts had been published. The second edition of all four parts was published in 1687.

Godbolt appears to have been born in 1575, and to have died in 1638. His reports were published in 1652, apparently from the same materials as were used by *William Hughes* in publishing *Leonard's* Reports.

(5) 16 Ves. 390.

(6) 9 Ex. 562.

(7) 8 App. Cas. 135.

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The lease of 1877 was made under a mistake of both parties, and ought to be rectified: *Cooper* v. *Phipps* (1); *Earl Beauchamp* v. *Winn* (2). With respect to the alleged acquiescence, there could be no acquiescence on the part of the Duke, as he was ignorant of his rights.

Sir *H. Davey*, Q.C., *Haldane*, Q.C., and *Decimus Sturges*, for the Defendant *Heathcote*:—

[LINDLEY, L.J.:—We do not wish to hear you on the question of rectification of the lease.]

The recital that Earl *Gower* and Viscount *Trentham* were seised in fee did not act as an estoppel, because the true state of the title appears by the subsequent part of the deed. Nor did the recital operate as an informal appointment to themselves, for that would have been contrary to the intention of the parties as expressed in the deed. Therefore, the conveyance to *J. E. Heathcote* could not operate as a grant; it could only take effect as an appointment to him, and the saving of liberty to dig minerals was a regrant by him to the appointors of a license to dig. The appointee could not regrant the minerals themselves, for minerals did not lie in grant; he could only regrant a license which is incorporeal. The word "reserved" is an indication that the thing referred to was newly created out of the tenement conveyed, and not originally a part of it: *Co. Litt.* (3). A license is never exclusive, unless it is expressed to be so. It only makes lawful that which otherwise would have been a trespass: *Wickham* v. *Hawker* (4). It has always been held that if a man grants to another license to cut timber or dig minerals on his land, the grantee may take all that he can, but the owner has also a right to cut and dig as he pleases: *Lord Mountjoy's Case* (5); *Chetham* v. *Williamson* (6); *Carr* v. *Benson* (7); *Newby* v. *Harrison* (8); *Denison* v. *Holliday* (9). *Duke of Hamilton* v. *Dunlop* (10) was decided according to Scotch law, and does not apply.

(1) Law Rep. 2 H. L. 149.
(2) Ibid. 6 H. L. 223.
(3) Pages 47 a, 143 a.
(4) 7 M. & W. 63.
(5) 1 And. 307; 4 Leon. 147.
(6) 4 East, 469.
(7) Law Rep. 3 Ch. 524.
(8) 1 J. & H. 393.
(9) 1 H. & N. 631.
(10) 10 App. Cas. 813.

There is nothing in this deed from which a covenant not to give licenses to any one else can be inferred. *Bailey* v. *Stephens* (1) does not support the Plaintiff's case, and *Lee* v. *Stevenson* (2) has no bearing upon it. *Doe* v. *Wood* (3) has never been overruled, and is in our favour.

[BOWEN, L.J., referred to *Wilson* v. *Mackreth* (4).]

That case turned upon the ground that the Plaintiff had a right of property in the turf as if there had been a grant of it; and *Harker* v. *Birkbeck* (5) is similarly explained. We say, then, that we were at perfect liberty to work the mines so long as we did not interfere with workings carried on by the Plaintiff, and we have not interfered with the license given him by the deed.

[They further contended that the Plaintiff was barred by acquiescence and the *Statute of Limitations.*]

Rashleigh, for *Blair & Bird*, relied on the Plaintiff's acquiescence in the lease of 1865 and on the *Statute of Limitations.*

Rigby, in reply, cited *Co. Litt.* (6) upon the point that a release at Common Law will not operate to enlarge an estate; and *Sheppard's Touchstone* (7), as to an exchange operating as a grant.

1892. Jan. 27. The Lord Justice LINDLEY now delivered the judgment of the Court (*Lindley*, *Bowen*, and *Fry*, L.JJ.):—

This is an appeal from the decision of Mr. Justice *Vaughan Williams*, reported in [1891] 3 Ch. 504. Many questions were argued on the appeal; but the main question, on which everything else turns, is the effect of the deed of 1783. That deed effected an exchange of lands between the then Earl *Gower* and his son, Viscount *Trentham*, on the one side, and Mr. *Heathcote* on the other.

The lands exchanged were in the county of *Stafford*, and in a mineral district. No mines were worked in or under them, but coal was got from mines in the neighbourhood.

(1) 12 C. B. (N.S.) 91.
(2) E. B. & E. 512.
(3) 2 B. & Al. 724, 739.
(4) 3 Burr. 1824.
(5) Ibid. 1556.
(6) Page 270 b.
(7) Page 298.

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Mr. *Heathcote* was the owner in fee of the lands which he gave in exchange; but Earl *Gower* and his son were not owners in fee of the lands they gave in exchange. They had a joint power of appointing those lands in fee; but, subject to that power, the lands were settled by a deed of 1781 on Earl *Gower* for life, with remainder to Viscount *Trentham* for life, with remainder to his first and other sons in tail male, with divers remainders over, and there were terms subsisting for purposes of raising money.

That being the position of affairs, the deed of 1783 was executed. Mr. *Heathcote* conveyed his lands to the Earl and Viscount as joint tenants in fee, and reserved no minerals nor any right to work them. The Earl and Viscount conveyed their lands to Mr. *Heathcote* in fee, and reserved to themselves and their heirs a right to work the minerals under them. By this deed, which recited the settlement of 1781, and the power of revocation and new appointment given by it to the Earl and Viscount, it was witnessed that the Earl and Viscount, "in order to enable them legally to make the said exchange to and with the said *J. E. Heathcote* as aforesaid, by virtue of the power reserved and given to them in and by the said recited proviso as aforesaid," revoked and determined the uses of the settlement, so far as they related to the property intended to be given in exchange to Mr. *Heathcote*. And it was further witnessed that the Earl and Viscount, in consideration and pursuance of the said exchange, and for divers other good and valuable considerations, exchanged, granted, bargained, sold, aliened, transferred, limited, appointed, and confirmed to Mr. *Heathcote*, his heirs and assigns, the property therein described, and all the estate, right, title, interest, claim, and demand whatsoever of the said Earl *Gower* and Viscount *Trentham*, or either of them, in and to the said lands and premises, "Saving and reserving, nevertheless, to the said *Granville*, Earl *Gower* and *George Granville*, Lord Viscount *Trentham*, and to their heirs and assigns, full and free liberty, by all necessary and convenient ways and means, to search for, get, dig, drain, and carry away the coal, ironstone, and other minerals which may or shall be found within the said several lands hereby granted and exchanged from them, the said Earl *Gower* and Lord Viscount *Trentham*, to the said *J. E. Heathcote*, his heirs and assigns, and also to drive

any sough, level, or gutter through the same lands to any other lands or grounds of them the said Earl *Gower* and Lord Viscount *Trentham*, or either of them, making satisfaction for all damages to be done or occasioned by the use or exercise of any of the privileges aforesaid, have and to hold all and singular the said messuage or tenement lands and premises (saving and except as aforesaid), unto the said *J. E. Heathcote*, his heirs and assigns, to the only proper use and behoof of the said *J. E. Heathcote*, his heirs and assigns, for ever."

In order to understand the effect of this deed, it is necessary to carry our minds back to 1783, and construe it as such instruments were construed at that date. We must not forget that in those days a grant did not pass lands, mines, or minerals, although it might confer a right to work them.

A right to work mines is something more than a mere license: it is a *profit à prendre*, an incorporeal hereditament lying in grant. The distinction between a license and a *profit à prendre* was pointed out in *Wickham* v. *Hawker* (1), a leading case on rights of sporting.

Counsel for the Appellant contended that the reservation clause ought to be construed as an exception of the mines and minerals. But this, we think, would be to violate well-settled rules of conveyancing. The words used are not apt for the purpose. No conveyancer intending to except mines and minerals from a conveyance of lands would express his intention by reserving a liberty to get minerals. If, indeed, it were plain from recitals or other clauses in the deed that an exception was intended, possibly effect might be given to it. But here there is nothing *aliunde* to shew what was intended, and the intention can only be inferred from the wording of the clause in question. This observation is also the answer to the argument based upon the Scotch case of *Duke of Hamilton* v. *Dunlop* (2). Unless a clear intention to except the minerals can be established, that case is of no assistance. The fact that the parties to the deed of 1783 were effecting an exchange does not make their intention as to the minerals plainer than the words in which they have expressed it. That Mr. *Heathcote* did not intend to except the

(1) 7 M. & W. 78. (2) 10 App. Cas. 813.

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minerals from the land which he conveyed nor to reserve any right to get minerals under it is plain; but there is nothing to warrant the inference that he intended to exchange his lands for the surface only of the lands conveyed to him.

An exception of the mines, moreover, would leave them out of the property conveyed by Earl *Gower* and his son, and would leave them subject to the uses of the settlement of 1781, which clearly was not the intention of any one. Mr. *Rigby's* answer to this was that the clause might be read as a revocation of those uses, and a new appointment of the mines to the Earl and his son as joint tenants in fee. But this, again, raises the question whether they intended anything of the sort. Having no guide to what they intended except the words of the reservation itself, we cannot force those words to the extent necessary in order to make them amount to an exception or reservation or valid regrant of the mines and minerals in the sense of so much land.

We come, therefore, to the conclusion that what was reserved to the Earl and his son was full and free liberty to work the mines under the lands conveyed by them. They reserved a *profit à prendre*, an incorporeal hereditament, not a mere personal revocable license. But then the question arises whether this right so reserved to them was an exclusive right. The persons who claim under the Earl and Viscount have never attempted to exercise this right; the Defendants have never denied the Plaintiff's right to work the mines, nor obstructed him in any way. The Plaintiff, however, says that, whether he wants to work the mines or not, the Defendants have no right to work them, and that by working them the Defendants have infringed the Plaintiff's rights. Now, putting all legal subtleties and technicalities aside, this is in substance a claim by the Plaintiff to the mines in question, and if his right to the mines as his property is negatived, it is not easy to see how he can establish a right, not only to work the mines, but to prevent the owners of them from doing so, when the Plaintiff is not himself working them. A *profit à prendre* is a right to take something off another person's land; such a right does not prevent the owner from taking the same sort of thing from off his own land; the first right may limit, but does not exclude,

the second. An exclusive right to all the profit of a particular kind can, no doubt, be granted; but such a right cannot be inferred from language which is not clear and explicit. This is plain from the many cases referred to in the argument, viz.: *Lord Mountjoy's Case* (1); *Chetham* v. *Williamson* (2); *Doe* v. *Wood* (3); and *Carr* v. *Benson* (4).

In *Lord Mountjoy's Case*, property was conveyed to two persons, *John* and *Charles*, in fee, and they covenanted and granted with and to their grantor as follows: "That it shall be lawful for Lord *Mountjoy*, his heirs and assigns, at all times hereafter to have, take, and dig in and upon the heath-ground of the premises from time to time, sufficient ores, heath, turves, and other necessaries for the making, &c., of allom or copperas . . . . without let or interruption of the said *John* and *Charles* (*i.e.*, the grantees of the land), their heirs or assigns, or either of them." In *Anderson's* report it is said to have been resolved (*inter alia*) "(3.) that the Lord *Mountjoy* might dig ore and other things for making of allom and copperas, &c., as he should think good." This report leaves it uncertain whether the Lord *Mountjoy* had an exclusive license or not. But it appears from the report in *Leonard* that it was held that there was a new grant of an interest to dig to Lord *Mountjoy* and his heirs in the land, and not a mere covenant, and that *Brown* (*i.e.*, the grantee of the lands) and his heirs and assigns might dig there notwithstanding the said grant to the said Lord. Now, *Leonard* is well known to have been a very accurate reporter, and *Lord Mountjoy's Case* has always been regarded as a leading authority for the proposition that a grant in fee of liberty to dig ores does not confer on the grantee an exclusive right to dig them, even if the grant is in terms without any interruption by the grantor. This was the view taken of the case in *Chetham* v. *Williamson*, and in *Doe* v. *Wood*, and has never been judicially questioned.

In the present case, however, the reservation is not of liberty to take coal, but of full and free liberty to take the coal; but, inasmuch as the grantee could take all the coal if he wanted it, even if the word "the" were omitted, we cannot think that the

(1) 1 And. 307; 4 Leon. 147.
(2) 4 East, 469.
(3) 2 B. & Al. 724.
(4) Law Rep. 3 Ch. 524.

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introduction of that word can have the effect of so enlarging the operation of the grant or reservation as to exclude the owners of the soil and their assigns from working the coal, which the grantees of the liberty to work the coal were not themselves in a position to get. There is nothing to warrant the inference that any particular stress or emphasis was put, or ought to be put, on the word "the" in the clause in question. The words used in this reservation are certainly not such as any conveyancer in 1783 would have used in order to reserve an exclusive right to work the mines; there is not enough, in our opinion, to shew that anything more was reserved than a right to work the mines when desired; such a right does not exclude the right of the owner to work them, provided he does not disturb the grantee in his working operations when and where he is carrying them on.

We concur, therefore, with the learned Judge whose decision is appealed from, and hold that the Defendants have not infringed, and are not infringing, the Plaintiff's rights.

This conclusion renders it unnecessary to consider any of the other questions discussed, except the right of the Plaintiff to have the lease of 1877 to him rectified on the ground of mistake. During the course of the argument it was pointed out that no mistake common to both parties was proved; that there were no materials for rectifying the lease and making it conform to the intention of both parties; and that, under these circumstances, the only possible right which the Plaintiff could have would be to have the lease set aside on equitable terms, one of which would be giving up possession of the property leased. The Plaintiff was not prepared to do this, and it is plain, therefore, that he is not entitled to have that lease either rectified or set aside. The appeal must be dismissed with costs.

Solicitors: *Gadsden & Treherne; Cooper, Thorowgood & Tabor*, agents for *Coopers, Newcastle, Staffordshire; Greenfield & Cracknall*, agents for *Edward Young, Longton.*

W. W. K.
H. C. J.

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Feb. 4.

Practice—Parties—Adding Defendant—Action for Infringement of Patent—Application by maker of Machine used by Defendant—Rules of Supreme Court, 1883, *Order* XVI., *r.* 11.

The Plaintiff, the patentee of a machine, brought an action against the Defendant for using a machine which he alleged was an infringement of his patent. *M.*, the maker and patentee of the Defendant's machine, applied to be added as a defendant, alleging that a judgment in the action would injure him, and that the present Defendant would not efficiently defend the action:—

Held (reversing the decision of the Vice-Chancellor of the County Palatine of *Lancaster*), that *M.*, not being directly interested in the issues between the Plaintiff and Defendant, but only indirectly and commercially affected, the Court had no jurisdiction to add him as a defendant.

THIS was an appeal from an order of the Vice-Chancellor of the County Palatine of *Lancaster*.

The Plaintiff was the registered owner of a patent for improvements in machines for weaving, and the action was brought on the 30th of November, 1891, to restrain the Defendant from using machines made according to his patent or in colourable imitation of it.

The machines used by the Defendant were manufactured by *Auguste Montforts*, in *Prussia*, under a patent which he had obtained in that country. On hearing of the present action *Montforts* communicated with the Defendant, and offered to defend the action and to indemnify the Defendant; but the Defendant, although willing to bring in *Montforts* under the third party practice, declined to allow him to undertake the defence of the action; and he threatened that unless *Montforts* gave him an indemnity, he would not defend the action, but would make such terms with the Plaintiff as he should be advised. Under these circumstances *Montforts* obtained from the Vice-Chancellor of the County Palatine an order to add his name as a co-defendant to the action.

From this order the Plaintiff appealed.

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Dr. *Pankhurst* (*Moulton*, Q.C., with him), for the Appellant:—

The application was made under Order XVI., rule 10, of the Palatine Court, which is identical with Order XVI., rule 11, of the rules of the Supreme Court (1), which enables the Court or a judge to add parties as plaintiffs or defendants who ought to have been joined, or whose presence may be necessary for effectually determining the questions involved in the cause. It cannot be said that either of these conditions is fulfilled here. *Montforts* is not a necessary party to the action, nor is his presence required for the decision of the questions at issue between the Plaintiff and Defendant. The rule was only intended to apply to cases in which, under the old practice, there might have been a plea of abatement: *Kendall* v. *Hamilton* (2). It would be most unreasonable to hold that a patentee could not maintain an action against a defendant who had infringed his patent, without having to contend against everybody who used or made similar machines.

Hopkinson and *Astbury*, in support of the order:—

Montforts is interested not merely incidentally, but primarily and substantially, in this action. The real question at issue is whether machines made by *Montforts* are an infringement of the Plaintiff's patent. The Plaintiff's plan is to sue those who use *Montforts'* machines one after another, and probably none of them will think it worth their while to contest the Plaintiff's claim seriously, but will make terms with him. The Plaintiff will advertise the result, and the consequence will be that the

(1) Order XVI., rule 11: "No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added."

(2) 4 App. Cas. 504, 516.

public will be afraid to use *Montforts'* machines. It is therefore reasonable that he should be admitted as a defendant to defend the action on its merits against the Plaintiff, and establish the validity of his own patent. It is true that he is not a necessary party to the action; but his presence is necessary to "enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause": *Vavasseur* v. *Krupp* (1); *Wilson* v. *Church* (2); *Edison & Swan United Electric Light Company* v. *Holland* (3); *May* v. *Newton* (4); *Jacques* v. *Harrison* (5); *Apollinaris Company* v. *Wilson* (6). See also the dictum of *Jessel*, M.R., in *Molloy* v. *Kilby* (7).

LINDLEY, L.J.:—

This is an appeal from an order of the Vice-Chancellor of the County Palatine of *Lancaster*, by which he has directed, in an action in the Palatine Court, that *Montforts* should be added as a defendant on his own application.

The action is an ordinary action to restrain an alleged infringement of the Plaintiff's patent by the Defendant *Marsden*, by using a machine which was made abroad by *Montforts*, who says he has a patent for it in *Germany*. The order has been made under the rule of the Palatine Court which is identical with Order XVI., rule 11, of the Rules of the High Court. The question at issue between the Plaintiff and the Defendant *Marsden*, as far as they two alone are concerned, can be worked out without anyone else being brought in to take part in the action. There may be a score of persons like *Marsden* using this particular machine, but there is no law or equity to oblige the Plaintiff to sue all of them. Therefore, it is clear that it cannot be said that the case comes within that part of the rule which provides that the Court may order the names of any parties, whether plaintiffs or defendants, "who ought to have been joined," to be added. In no sense can it be said that *Montforts* ought to have been joined as a party to this action. But reliance

(1) 9 Ch. D. 351.
(2) Ibid. 552.
(3) 41 Ch. D. 28.
(4) 34 Ch. D. 347.
(5) 12 Q. B. D. 165, 168.
(6) 31 Ch. D. 632.
(7) 15 Ch. D. 162, 164.

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is placed on the following words of the rule, which provide for adding the names of parties "whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter." But what is the question involved in this action? The question, and the only question, is whether what *Marsden* is doing is an infringement of the Plaintiff's patent. In order to properly understand the rule we must look at the whole of it. It begins by saying, "No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties"—that is the key to the whole section: if the Court cannot decide the question without the presence of other parties, the cause is not to be defeated, but the parties are to be added so as to put the proper parties before the Court. In the Court of Chancery actions were common enough in which one person represented and acted on behalf of many; and if any one of the many could satisfy the Court that the person appointed to represent them did not adequately represent the interests of the class, it was a reason for putting someone else in his place. It was said that the rule goes further, but can it be reasonably extended beyond this? Can it be said that the rule prevents the plaintiff from proceeding against a defendant without having to litigate with everybody who may be in any way affected, however indirectly, by the action? It appears to me that it does not. The counsel for the Applicant grounded his argument on the allegation that *Montforts'* interest would be affected by the decision in this action. It is true that his interest may be affected commercially by a judgment against the Defendant, but can it be said that it would be legally affected? Can we stretch the rule so far as to say that whenever a person would be incidentally affected by a judgment he may be added as a defendant? No case has been cited that goes so far as that: *Vavasseur* v. *Krupp* (1), and *Apollinaris Company* v. *Wilson* (2), are the nearest to the present case. But in both those cases the proceedings affected the property of persons not before the Court. I can understand the application of the rule where the property of a third party is affected. He may well say, "I am not to be

(1) 9 Ch. D. 351. (2) 31 Ch. D. 632.

deprived of my property in my absence." But this case does not come up to that. In my opinion the Vice-Chancellor has construed the rule too widely. The case does not come under the rule at all; it is not a question of discretion, but of jurisdiction, and I think the order must be discharged.

KAY, L.J.:—

I entirely concur in the judgment which has been delivered, but out of respect to the Vice-Chancellor, I wish to add a few words as to the grounds on which I differ from him. He has extended the rule in question to a case which it was not intended to cover. The action is brought against *Marsden* personally, and any judgment which he may obtain will not affect *Montforts* directly, but only incidentally. But he says it will affect him, because the machine was made under his patent, so that in the action against *Marsden* the value of *Montforts'* patent comes in question, and although the judgment in this action would not bind him and could not be pleaded in any action against him or any one else, except *Marsden*, yet it will frighten people from buying his machines, and it therefore will affect him, if not directly, yet indirectly and commercially, and, therefore, that he ought to be let in to defend the action. I know of no case which goes to that extent. The class of cases where the property of the third party was affected, are on a different principle. The result, on the construction contended for, would be that not only persons directly affected, and who would be bound by the judgment in the action, would be within the rule, but any person who might think he would be affected indirectly might insist upon being made a party; and not only so, but if it appeared to the Judge that any person would be indirectly affected, it would be his duty of his own accord to make him a party. Take the case of an action for infringement of a trade-mark: there may be a good many persons doing the same thing as the defendant; could it be intended that all of them should have a right to insist on being made parties? No doubt the judgment in the present case may indirectly affect *Montforts'* patent; but the answer to that is, that whether it would affect it or not, this rule does not apply to such a case. *Montforts* says

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that the Defendant will not contest the case properly, and will not conduct the defence so energetically as he would. But we cannot help that. With all deference to the Vice-Chancellor, I do not think the rule applies to this case.

Solicitors: *Pritchard, Englefield & Co.*, agents for *Sampson & Price, Manchester; E. R. Walker, Manchester.*

M. W.

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[1890 J. 168.]
[1890 C. 2047.]

Patent—Practice—Amendment of Specification—Leave to Amend—Decision of Comptroller—Date when Amendment considered made—Pending Action for Infringement—Patents, Designs, and Trade Marks Acts, 1883, *ss.* 18–21; 1888, *s.* 5.

On the 19th of May, 1890, an application by *C.* for leave to make certain specified amendments in the specification of a patent to which *C.* was entitled was heard before the Comptroller, who, on the 9th of June, gave the leave asked for, but upon the condition that *C.* should not take any legal proceedings against *A.* (who was opposing the amendment) in respect of any infringement committed before the 1st of January, 1884. *C.* had during the argument assented to this condition. On the 11th of June *C.* commenced an action against *A.* for infringements subsequent to 1884. On the 30th of June the Patent Office asked *C.* for an undertaking in the terms of the condition, and on the 9th of July *C.* signed one and sent it to the office. The specification was actually amended on the 26th of August:—

Held, by the Court of Appeal, affirming the decision of *Chitty*, J., that, as the condition imposed by the Comptroller had been assented to, and after the leave to amend given on the 9th of June nothing remained to be done by *C.*, the specification was to be treated as duly amended on that day; that the action on the amended specification was therefore properly brought on the 11th, though the amendment had not been actually made; and that sect. 18, sub-sect. 10, of the *Patents, Designs, and Trade Marks Act*, 1883, did not apply so as to prevent the actual completion of the amendment by reason of the pendency of an action for infringement.

MOTION to discharge a reference to arbitration, which raised the question as to the exact date when a specification is to be deemed to have been amended by disclaimer, under the provi-

sions of the amended sect. 18 of the *Patents, Designs, and Trade Marks Acts*, 1883–1888.

Crossley Brothers, Limited, were the owners of a patent, A.D. 1881, No. 370, for "improvements in connection with gas motor engines and locomotives worked thereby." An action was commenced in February, 1890, by *J. E. H. Andrew & Co., Limited*, against *Crossley Brothers, Limited* [1890 J. 168], in which on the 28th of March, 1890, a motion for an injunction was made to restrain *Crossley Brothers, Limited*, from alleging that *Andrew & Co., Limited*, had infringed their patent, and from making threats of taking proceedings in reference to such alleged infringements.

Previous to this *Crossley Brothers*, had commenced proceedings in the Patent Office, which were still pending, to amend their specification by way of disclaimer. On the hearing of the motion for injunction no order was made except that the costs should be costs in the action, *Crossley Brothers* giving an undertaking not to threaten *Andrew & Co.* until the trial or further order, and to bring an action against *Andrew & Co.* as soon as their disclaimer was allowed.

On the 19th of May, 1890, the application for leave to amend was argued before the Comptroller, *Andrew & Co.* appearing by counsel to oppose. Their counsel asked that the amendment if allowed at all should only be allowed on the terms that *Crossley Brothers* should undertake that no legal proceedings should be taken against *Andrew & Co.* in respect of any alleged infringement of the patent when amended. Mr. *Imray*, for *Crossley Brothers*, objected that this was *ultrà vires*. The Comptroller said he had power to impose the condition as to infringements up to the 31st of December, 1883, and Mr. *Imray* replied that he did not object to a condition so limited. Counsel for *Andrew & Co.* did not press for a more stringent condition.

On the 9th of June, 1890, the Comptroller gave his decision in writing allowing the amendments, and declining to impose the condition asked for by *Andrew & Co.*, "but as this amendment relates to a patent granted before the said Act" (the Act of 1883) "came into operation, I allow the amendment only upon condition that the patentees and all persons claiming under

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them, or either of them, shall not take any legal proceedings against *J. E. H. Andrew & Co., Limited,* in respect of any infringement or alleged infringement of the said patent committed prior to the first day of January, 1884."

On the 11th of June, 1890, the writ in the infringement action, *Crossley* v. *Andrew* [1890 C. 2047], was issued, and the statement of claim stated the specification to have been amended.

On the 30th of June a notice was sent from the Patent Office to *Crossley Brothers* requesting them to furnish the Comptroller "with the undertaking required by his decision" of the 9th of June. Inclosed was a form of undertaking, which was in the terms of the condition imposed by the Comptroller. They signed the form and returned it to the office on the 9th of July, 1890, and it was filed. The specification was formally amended by the proper officer in the Patent Office on the 26th of August, 1890, and the amendment was duly advertised on the following day pursuant to sect. 21.

The two actions having been referred by consent to an arbitrator, under an order of the 19th of June, 1891, and *Crossley Brothers* having proposed to put in evidence the amended specification, it was objected to by *Andrew & Co.*, on the ground that on the 11th of June, when the writ was issued, the amendment had not been actually made, and that by sub-sect. 10 of sect. 18 of the Act the provisions as to amendment did not apply where an action for infringement was pending, and, consequently, that under the circumstances of the present case the amended specification was not admissible in evidence.

The arbitrator allowed this objection, on the ground that the leave to amend was not complete until the undertaking was given on the 9th of July, 1890. He considered, however, that the question was one of great difficulty, and stated in writing the reasons for his decision.

Crossley Brothers now moved to discharge the order of the 19th of June, 1891, and to revoke the submission to arbitration thereby made, unless the arbitrator should receive the amended specification in evidence as having been duly amended, and as having been so amended on the 9th of June, 1890.

The motion was heard before Mr. Justice *Chitty* on the 18th of December, 1891.

Sir *R. E. Webster*, A.G., and *Lawson*, for *Crossley Brothers*:—

The form of the present application was suggested by the decision in *Hart* v. *Duke* (1), and the question has been raised in this way in order to save the expense of a special case.

A specification must be deemed to be amended at the time when the decision giving leave to amend is given; the actual amendment is now made in the Patent Office, and it cannot have been intended that the patentee's rights should be prejudiced by any delay in the Patent Office. The mere ministerial act of altering the specification or drawings follows as a matter of course in pursuance of the leave to amend; the mere giving of a consent to any condition imposed by the Comptroller does not fall within the spirit and intention of the words in sub-sect. 10 of the amended sect. 18 of the *Patents, Designs, and Trade Marks Acts*, 1883-1888, so as to constitute a step or proceeding the taking of which is prohibited while an action for infringement is pending. The specification having therefore been duly amended on the 9th of June, 1890—two days before the infringement action was commenced—was properly admissible in evidence. The condition as to not suing for infringements committed prior to the 1st of January, 1884, is the usual condition which is now invariably imposed when the patent was granted before that date.

Hopkinson, and *J. C. Graham*, for *Andrew & Co., Limited*:—

Leave to amend was expressly given "only on condition" that no action was brought for infringement prior to January, 1884; therefore, until this condition was accepted—viz., until the 9th of July, 1890—leave to amend did not become absolute; therefore, the earliest date at which this specification could be deemed to have been amended was the 9th of July. On this point the decision of the arbitrator was correct. Conditional leave to amend cannot amount to amendment. Having regard to the decision in *In re Berdan's Patent* (2), the Comptroller was

(1) 32 L. J. (Q.B.) 55. (2) Law Rep. 20 Eq. 346.

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quite right in requiring a written undertaking. Further, we say that everything, up to and including the physical act of amendment, ought to be complete before any action for infringement is brought. The public, looking at the register here up to the 26th of August, 1890, would have had no idea that the specification had been amended by disclaimer on the 9th of June, and as a fact, a certified copy of the old specification was actually furnished to us by the Patent Office in July, 1890, as being the specification then in existence, because the Applicants had not at that time complied with the condition imposed by the Comptroller.

When an action for infringement is pending, a patentee can only amend his specification by first obtaining the leave of the Court or a Judge: to justify an amendment here, the Applicants must rely on sect. 18, and sub-sect. 10 provides that none of the foregoing provisions as to amendment by the Comptroller shall apply, pending an action. If the amendment was made on the 9th of June, as the Applicants contend, then the office deprived us of our right to appeal. There has been some confusion between amendment and leave to amend, and this application should be refused.

[They also referred to *In re Nickels' Patent* (1) as shewing that the patentee is bound by what is done in the Patent Office.]

Sir *R. E. Webster*, in reply:—

Under sect. 18, the request in writing for leave to amend down to the hearing, is one continuous act, and the amendment is made when leave is granted. There is nothing in the statutes or rules requiring the consent of the patentee to any condition, to be given in writing; any consent subsequently given relates back to the date of the Comptroller's decision giving leave to amend.

1892. Jan. 11. CHITTY, J. (after stating the object of the present application, and the facts, and observing that the condition not to sue for infringements committed prior to the 1st

(1) 1 Web. P. C. 650.

of January, 1884, was invariably imposed by the Comptroller in the case of patents granted before that date, continued):—

No question was raised before me as to the Comptroller's power to impose such a condition. Although the authority to impose conditions is not specially mentioned in sub-sect. 3 of sect. 18, the Comptroller clearly has such authority when the opponent appears, just as he has where there is no opposition, or the opponent does not appear under sub-sect. 5. [Having referred to the application by the Patent Office on the 30th of June, 1890, for the undertaking required by the Comptroller's decision of the 9th, which he held only amounted to a request that the patentees would give their assent in writing to the condition imposed by his decision before the amendment was actually made in the specification, his Lordship proceeded:—]

It is not the practice in the Patent Office to enter such an undertaking on the register; but, by error, a clerk in the office did make an entry on the register of the undertaking given on the 9th of July. It seems, however, to be the practice, where a condition is imposed, to require some such an undertaking, although the Office does not insist on any particular form.

The arbitrator decided that the leave to amend was not complete until the undertaking was given on the 9th of July. It follows from his decision, that by reason of the issue of the writ on the 11th of June, the proceedings before the Comptroller were stayed by virtue of sub-sect. 10. Before me, it was contended for *Andrew & Co.*, first, that this decision was right, and, secondly, that any writ issued before the 26th of August, when the amendments were actually made, would necessarily stay any further proceedings before the Comptroller. In other words, the argument was, that the patentees were not entitled to commence any action on the amended specification until after the 26th of August. The decision of the arbitrator, and this latter contention, which goes beyond his decision, are founded on sub-sect. 10; the effect of the decision and of this further contention, if sound, is to upset all that was done in the Patent Office after the 11th of June, because on and after that date an action for infringement was pending. Accordingly, the patentees must dismiss their action for infringement and proceed *de novo* before the

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Comptroller as from the 9th of June, before they can bring another action for infringement.

But, in my opinion, neither of the contentions for *Andrew & Co.* can be maintained. The correct reading of the amended 18th section is, that the proceedings for amendment terminate with the leave to amend. No further provision is made. True it is that the actual amendment is made by virtue of that section, and of that section only; but there is no direct provision for making the amendment. It is treated as something which follows from the decision, something to be done as a mere ministerial act, and, as a matter of course, in pursuance of the decision. Sub-sect. 9 enacts, that leave to amend shall be conclusive as to the right of the party to make the amendment, except in the case of fraud; and then, tacitly treating the amendment as in fact made, and without any provision as to the amendment being made, it goes on at once to enact that the amendment shall, in all Courts and for all purposes, be deemed to form part of the specification. Obviously, the Legislature thought it superfluous to insert any provision as to the making of the amendment. Further, authority is given to the Comptroller, and to the law officers where there is an appeal, to impose conditions; but no provision is made for the acceptance of any condition imposed. No doubt, the patentee can, if he is dissatisfied with the condition imposed, decline to allow his specification to be amended; and he might, by notice to the Patent Office, require that no amendment should be made. No doubt, also, it is a convenient and reasonable course on the part of the Office, to obtain an assent in writing from the patentee before making the actual amendment; the written assent precludes the patentee from alleging that he did not accept the conditions: see *In re Berdan's Patent* (1). It is an error, however, to ask for an undertaking. The undertaking given in this case added nothing to the force of the condition imposed by the Comptroller under his statutory authority; no action or proceeding of any kind could be taken to enforce the undertaking, which was given to the Comptroller alone. In fact, as appears from the evidence before the arbitrator, the Office does not insist upon any parti-

(1) Law Rep. 20 Eq. 346.

cular form of undertaking or consent; really all that it requires is an assent before proceeding to make the amendments. On the evidence as to the proceedings before the Comptroller, I hold that Mr. *Imray* did in fact assent to the condition on the 19th of May. There is no question as to his authority to assent to this well-known condition, invariably imposed. He assented to this condition, just as he did to the suggested modification of the proposed amendments. Perfect consistency on the part of the Office would have required a written assent to this modification also. But this was not thought necessary. In his written decision, the Comptroller states that the patentees had agreed to this modification; they had, in fact, so agreed, but only through Mr. *Imray* at the hearing on the 19th of May. The Comptroller did not state that the patentees had accepted the condition; probably it had escaped his attention that Mr. *Imray* had done so. In this case, then, I think that a subsequent written assent to the condition was not necessary, although as a mere matter of business, and to prevent any possible question, it was not unreasonable to ask for an assent in writing. In any case, I hold that a written assent to a condition imposed by the statutory authority relates back to the decision. And further, I hold (and this appears to me to be the crucial point of the case) that the giving of such written assent does not fall within the true meaning of the words "the foregoing provisions of this section," contained in sub-sect. 10, and, consequently, that it is not a step the taking of which is prohibited while an action for infringement is pending. For these reasons, I think that the amended specification was admissible.

Such being my opinion, it is not necessary to consider whether *Andrew & Co.* have not precluded themselves from raising the objection to the admissibility of the amended specification, by reason of the undertaking they took from the patentees in the threats action, to bring an action for infringement so soon as the disclaimer was allowed.

In conformity with the practice, uniformly adopted, the Patent Office state at the top of the printed copies of the amended specification of *Crossley Brothers*, as now issued from the office, that the specification was, upon the 9th of June, 1890, amended

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under sects. 18 to 21 of the *Patents Act*, 1883. It follows from what I have said, that I consider this practice correct, and in conformity with the Act.

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Andrew & Co. appealed from this decision. The appeal was heard on the 17th of February, 1892.

Hopkinson, Q.C., and *J. C. Graham*, for the appeal:—

We contend that an amendment must be actually made before an action can be brought on the amended specification. This is a matter of substance; for a person might go to the Patent Office, and, finding the specification in its original form, might manufacture the patented articles on the ground that the patent was bad. It is the practice of the Patent Office to furnish copies of the original specification without alteration until the amendment has been actually made. There is nothing on the register to indicate an amendment until that time, and the Legislature intended the register to be conclusive. Here no notice of the amendment appeared in the register until long after the action had commenced. Then the leave to amend was conditional. Acceptance of the condition was necessary: *In re Berdan's Patent* (1). There was no acceptance till the 9th of July; so that till that time there would not, apart from the action, have been complete leave to amend. The amendment being incomplete when the action was commenced could not be completed: sect. 18, sub-s. 10. The Plaintiffs might obtain leave of the Court under sect. 19, but no such leave was obtained, the amendment, therefore, was invalid. The Act does not speak in terms of the actual amendment, but it throughout treats amendment as something following the leave to amend. The specification cannot be treated as amended until the amendment is actually made, or at the earliest, until the undertaking to accept the condition has been given.

Sir *R. E. Webster*, A.G., and *Lawson*, for *Crossley Brothers*, were not called upon.

(1) Law Rep. 20 Eq. 346.

LINDLEY, L.J.:—

This is an appeal from a decision of Mr. Justice *Chitty*, in substance holding that this action, commenced on the 11th of June, 1890, for the infringement of *Crossley's* patent, is maintainable. The form of the question submitted to him is perhaps open to a little criticism; but I do not think that much importance need be attached to the form. The question is put in this way: Whether the arbitrator shall receive the amended specification in evidence? The action being upon a patent and the statement of claim referring to the amended specification, it is very difficult to see how you can exclude the amended specification. The real question is whether this action, having been brought before the specification was actually amended, though after leave had been given to amend it, is maintainable.

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Now, we must see what the difficulty is. The patentees had in the early part of the year 1890, applied for leave to amend; and on the 9th of June, 1890, they obtained leave to amend on the condition that no action for infringement should be brought for anything done before the 1st of January, 1884. That condition, I understand by the evidence, was then and there accepted. The amendment, therefore, was made in every sense except this, that the document was not actually altered. By the rules of the office, when a person applies to amend he must state precisely what amendment he wishes to make. Therefore, when the Comptroller accedes to the request, the words of the amendment are accurately known in the office, and nothing remains to be done, in order to complete the amendment in the fullest possible sense, except to make the formal entry of it in the office.

That being the position of affairs when the Plaintiffs bring this action upon their amended specification, what is the objection to it? The objection taken to it is that the amendment was not complete. Reliance is placed upon a minute criticism of sect. 18 of the *Patents, Designs, and Trade Marks Act*, 1883, and the argument is based on the 10th sub-section of that section, which, as amended by the Act of 1888, runs thus: "The foregoing provisions of this section do not apply when, and so long as any action for infringement or proceeding for revocation of a patent

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is pending." An action was pending on the 11th of June, 1890, for the infringement of this patent, so the "foregoing provisions" of the section are not to apply. But which of them, apart from sub-sect. 10, could apply to the present case. The only one as to which there can be any doubt whatever is the last part of sub-sect. 9: "And the amendment shall in all Courts and for all purposes be deemed to form part of the specification." When sub-sect. 10 is carefully looked at, it is, to my mind, quite obvious what the meaning is—that the patentee is not to take proceedings to obtain leave to amend while an action for infringement is pending. It does not say that when before an action is commenced the patentee has got leave to amend, and when everything is done except the actual mechanical amendment of the specification, that mechanical part shall not be done because the action is pending. As I understand the matter, it is the business of the office to amend. It is very true that, in order to prevent inconvenience, they put it off until they get a written acceptance of the conditions; but the formal amendment is not the applicant's business at all. If, indeed, the Comptroller had required the patentee to bring in extra drawings, or had required him to do anything else, and he had not done it before commencing his action, then perhaps the argument which we have listened to would have some weight; but when leave to amend has been given, and there is nothing at all left to be done by the patentee, it appears to me that the amendment must be considered complete.

Mr. *Graham* relied on sect. 19 as making the sanction of the Court necessary. That sub-section provides, that in an action for infringement of a patent the Court or a Judge may at any time order that the patentee shall be at liberty to apply at the Patent Office for leave to amend. But the patentee in the present case does not want leave to amend—he has got it already; and I cannot see that this clause puts the slightest difficulty in his way. The appeal, in my judgment, cannot be allowed.

KAY, L.J.:—

I entirely agree. It seems to me that the very ingenious argument addressed to us means one of two things—either that

the amendment has not been made, and cannot be made pending the action, without leave of the Court, or that the action was an action improperly brought and ought to be stayed. That is the essence of this particular application.

Now, in my opinion, the action was properly brought; and everything necessary to amend this specification which was required to be done by sect. 18 before the action was brought had been done. There is not one word in sect. 18 about making what has been called a physical amendment of the specification itself. That section provides for the mode in which a patentee may apply for leave to amend the specification, for the mode in which that application may be granted, for a power of appeal from the Comptroller's decision; it suggests and intimates in two of the sub-sections in terms that the leave may be given subject to conditions; but if the application has been duly made —as was the case here—if the leave was explicitly given subject to a condition—which was the case here—and if that condition was assented to—which was the actual fact here—before this action was begun, there is nothing whatever in that section, or in any of the sub-sections contained in it, which prevents the commencement of an action like this upon the amended specification.

In order to make that clear, I will refer to the section itself. I will take the last sub-section first, because the last sub-section as amended in the Act of 1888 is the one relied upon. It is as follows: "The foregoing provisions of this section" (that is, sect. 18) "do not apply when, and so long as any action for infringement or proceeding for revocation of a patent is pending." Now, we are not dealing with a "proceeding for revocation," because the action actually brought is an action for the infringement of the patent as amended. Is there one single thing that was to be done under sect. 18 which was left undone when this action was brought? The answer is, there is not one single thing provided for by sect. 18 which was left undone before this action was brought—not one. Consequently, when sub-sect. 10 provides, as it does, that the foregoing provisions of sect. 18 do not apply when an action for infringement is pending, that clearly does not have the least reference to a case like this, where everything that that section contemplates had been done and completed before

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the action was brought. The argument, to my mind, proceeds upon a perfect misapprehension of the meaning of that section. What had been done was this. The application, as I have said, had been made and acceded to; the amendment was allowed on the 9th of June; a condition had been imposed, and that condition had been accepted. Then, on the 11th of June, the action was brought; and on the 9th of July that was done which the Patent Office, for its own purposes, requires, but which is not required by anything in the Act of Parliament, viz., that, in order, I suppose, to have a record of the acceptance of the condition, they require a written undertaking in the same terms as the condition to be given. But before this action was brought, as I have said, the allowance of the amendment was made, and the condition had been accepted on the part of the patentee who applied to amend. Then what remained to be done was only this: by sect. 23 of the Act, it is provided that "There shall be kept at the Patent Office a book called the Register of Patents, wherein shall be entered .... notifications of assignments and of transmissions of patents, of licenses under patents, and of amendments, extensions, and revocations of patents ...." That was a thing with which the patentee had really nothing to do: it was the duty of the Patent Office. The section is imperative; it enacts that the book "shall be kept" and that there "shall be entered" a notification of the amendment. That was the only thing required. In no other way that I can see, and none has been suggested, was any alteration of the specification required by the Act to be made; and that notification which was to be entered in the register was a thing with which the patentee had nothing to do, but which was to be done by the office.

Now, what is there in the Act to shew that this action was wrongly brought? Sub-sect. 10 of sect. 18 provides for a perfectly different case. You cannot bring an action upon the patent as it was when unaltered, and then, pending that action, apply for leave to alter it without obtaining the leave of the Court under sect. 19; therefore, pending such an action as that, all these provisions for applying to alter the specification and obtaining leave to amend are not to apply at all. You cannot make the application for leave to amend except by leave of the Court.

There is nothing in that section, nor can I find anything in any part of the Act, which says that when the patentee has got the leave, when everything that the patentee has to do has been done, and nothing remains to be done but that the Patent Office should enter upon the register a notification of the amendment which it has allowed, he cannot bring an action on the amended specification. It has been ingeniously argued that, if that is the meaning of the Act, this consequence must follow, that after the leave has been given, and before it has been notified upon the register, the patentee might bring an action against a third person who knew nothing at all about the alteration. What then? Suppose he did bring such an action, he would have to state in the indorsement on his writ, I suppose, certainly in his statement of claim, that he was bringing the action upon a patent the specification of which had been amended, otherwise he might have his action stopped altogether, because it would be bringing it upon a patent based on a specification which no longer existed. The Defendant, therefore, though he might not be able to find out the amendment by searching the register, would know from the pleading upon what kind of specification the action was founded. There might, of course, arise this difficulty: the Defendant might say, "I infringed the patent believing it to be perfectly bad, having seen the original specification, and not having known of the alteration because it had not been entered on the register." The Court will deal with that sort of case when it arises; but the reply, so far as the patentee was concerned, would probably be, "I had nothing to do with entering it on the register; if it was not entered on the register that was not my fault, it was the fault of the Patent Office. I have done everything which the Act requires me to do, and am not answerable for the fault of the Patent Office."

Then, it is said to be the practice of the Patent Office, until the register has been actually amended, to issue to applicants copies of the specification as it originally existed, without any notification of the amendment, although the amendment has been allowed and the conditions acceded to. All I can say is, if that is the practice of the Patent Office, it is a very bad practice, and the sooner it is altered the better; for it is unfair to third

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persons who apply for copies of the specification to hand them out a copy of a specification, which, in fact, has been amended, without any notification that leave to amend it has been given. But, again, that does not alter the construction of the Acts. It does not in any way make this action an action wrongly brought, nor does it in any way shew that under these Acts the amendment which has been allowed was not, so far as the patentee is concerned, a complete thing before the action was brought. I think that it was complete, and I think this action was rightly brought. I do not see that any evil will result from this construction of the Acts; and I think that the appeal must be dismissed with costs.

Solicitors for *Crossley Brothers*: *Faithfull & Owen.*
Solicitor for *Andrew & Co.*: *E. R. Walker, Manchester.*

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[1891 A. 815.]

Settled Estate—Mansion-house—Sale—Tenant for Life—Bankruptcy—Mortgagee in Possession—Consent of Court—"Trustee"—Remaindermen—Tenants on Estate—Discretion of Court to allow Sale—Settled Land Act, 1882, *ss.* 3, 15, 50, 51, 53—*Settled Land Act,* 1890, *s.* 10—*Practice—Appeal—Hearing Respondent Trustee in support of Appeal.*

Upon a petition by a tenant for life of a settled estate, under sect. 10 of the *Settled Land Act,* 1890, for the sanction of the Court to a proposed sale of the mansion-house, the Court may, in a proper case, take a wider view than in the case of a proposed sale of heirlooms, such as in *In re Earl of Radnor's Will Trusts* (1).

Sect. 53 of the *Settled Land Act,* 1882, does not impose a condition affecting the title to the estate sold by the tenant for life, or his right to exercise his power of sale. The section constitutes a direction to the tenant for life as to his duty as trustee in the exercise of his powers; and the non-observance of that direction by disregarding the interests of the parties entitled under the settlement, and so causing pecuniary loss, will expose him to all the liabilities of a trustee. One of his duties in exercising his powers under the Act is, not only to safeguard the interests of

(1) 45 Ch. D. 402.

the remaindermen, but also to consider, in his double capacity of landowner and trustee, the general interest of the estate itself, including the interests of the tenants on the estate.

The *Settled Land Acts* do not in any way fetter the Court in its discretionary power of sanctioning or refusing an application by a tenant for life, under sect. 10 of the *Settled Land Act*, 1890, for its consent to a proposed sale of the mansion-house; and the Court will not fetter itself by laying down any rules for the exercise of its discretion upon such an application. The object of the Acts is to enable a settled estate to be set free from embarrassment; and the Court will, upon such an application, consider not only the wishes and interests of the tenant for life and remaindermen, but all the circumstances of the case, including the interests of the tenants on the estate.

An old family mansion-house and estate became vested, under a settlement, in a tenant for life, a young man against whom bankruptcy proceedings were pending, and who had mortgaged his life estate to a money-lender who had commenced a foreclosure action and taken possession by a receiver. The tenant for life, who was unable, owing to his impoverished condition occasioned by his extravagant habits, to reside on the estate, entered into a contract, under the *Settled Land Acts*, for the sale of the entire estate, including the mansion house, to a purchaser, and applied, under sect. 10 of the *Settled Land Act*, 1890, for the sanction of the Court to the sale of the mansion-house and demesne lands. It was proved that the contract was a peculiarly advantageous one in point of price, and that the same price could not be obtained by selling the mansion-house and demesne lands, and the rest of the estate, separately; but the application was opposed by all the existing remaindermen (uncles of the tenant for life, and the male issue of some of them), who desired that the mansion-house and demesne lands should be preserved in the family:—

Held, that, the Court, in the exercise of its discretion under the *Settled Land Acts*, must have regard, not merely to the wishes of the remaindermen, but to all the circumstances of the case; and that those circumstances—including the derelict condition of the estate, the fact of its being in the possession of a mortgagee, and the consequent prejudice to the interests of the tenants on the estate—outweighed the wishes of the remaindermen, and that, therefore, the sale of the mansion-house and demesne lands ought to be sanctioned.

Decision of *Stirling*, J., reversed.

The rule that a respondent to an appeal cannot be heard by counsel in support of the appellant's case, may be relaxed in favour of a respondent trustee who supports an appeal by a tenant for life, on a petition under sect. 10 of the *Settled Land Act*, 1890.

APPEAL from order of Mr. Justice *Stirling*.

This was a petition intituled in the matter of the *Settled Land Acts*, 1882 to 1890, by *George William Thomas Brudenell Bruce, Marquis of Ailesbury*, the tenant for life of the *Savernake*

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estate in the counties of *Wilts* and *Berks*, asking that the sanction of the Court might be given to a proposed sale by him to Lord *Iveagh* of a part of that estate, such part consisting of *Savernake House*, the principal mansion-house on the estate, with the pleasure grounds, park, and lands usually occupied therewith, in accordance with an agreement embodied in two contracts, dated the 23rd of June, 1891, between the Petitioner and Lord *Iveagh* for the sale of the entire estate. The estate comprised altogether about 40,000 acres, of which the greater part was arable and down land, with some pasture. There were ninety-five separate farms on it, containing altogether about 30,000 acres. There were, besides, 1000 cottages on the estate, also house property in the town of *Marlborough*, though the property in the town was of comparatively small value, yielding an income of about £750 a year. The park and pleasure grounds, enjoyed with the mansion-house, consisted of about 7743 acres, and included the famous *Savernake* forest, described by the Petitioner's witnesses as "of unique character and position, which probably had not its equal anywhere, and possessed of great beauty and amenities which were well known."

Savernake House was stated to have constituted the principal residence of the *Ailesbury* family since 1675, when it and also the park and forest were acquired by the marriage of the then Earl with Lady *Elizabeth Seymour*, the sole heiress of her brother *William*, the third Duke of *Somerset*, who had inherited the estate from the first Duke of *Somerset*, the Protector.

The Petitioner had entered into the agreement with Lord *Iveagh* in pursuance of the powers conferred by the *Settled Land Acts*, 1882 to 1890, and it was expressed to be conditional upon an order of the Court being obtained authorizing the sale of the mansion-house and the pleasure grounds, park, and lands usually occupied therewith, in pursuance of sect. 10 of the *Settled Land Act*, 1890, which enacts that "the principal mansion-house on any settled land . . . shall not be sold . . . by the tenant for life without the consent of the trustees of the settlement or an order of the Court." The remainder of the estate comprised in the agreement the Petitioner was enabled to sell as tenant for life without the consent of the Court, the section referred to constituting an

exception to the general power of sale given by the Acts to a tenant for life. The price agreed to be paid by Lord *Iveagh* for the entire estate was £750,000, of which £250,000 was to be paid on completion, the balance of £500,000 remaining on mortgage for five years at 4 per cent.

The Petitioner attained twenty-one on the 8th of June, 1884. On the 6th of May previously, he married the present Marchioness, but at present there had been no issue of the marriage. At the time he attained twenty-one, his grandfather, *Ernest*, Marquis of *Ailesbury*, was tenant for life of the *Savernake* estate, and also of certain family estates in *Yorkshire*, of which *Jervaulx Abbey* was the principal mansion, and the Petitioner was tenant in tail in remainder expectant on the death of his grandfather of both the *Savernake* and the *Yorkshire* estates. By deed, dated the 23rd of July, 1884, the Petitioner converted his estate tail in both properties into a base fee, and this, previously to July, 1885, he incumbered to the extent of £112,000.

By an indenture dated the 16th of July, 1885, and made between the said *Ernest*, Marquis of *Ailesbury*, of the first part, the Petitioner, then Viscount *Savernake*, of the second part, and Lord *Frederick Bruce* and *Hugh Mewburn-Walker* of the third part, the *Savernake* estate was resettled. By that deed the estate was limited to *Ernest*, Marquis of *Ailesbury*, for life. From and after his decease, the limitations, as now subsisting, were to the use of the Petitioner during his life, without impeachment of waste, with remainder to the use of his first and other sons successively in tail male, with remainder to the use of his uncle, Lord *Henry Bruce*, for his life without impeachment of waste, with remainder to the use of *George*, the eldest son of the said Lord *Henry Bruce*, for his life without impeachment of waste, with remainder to the use of the first and other sons of that eldest son successively in tail male, with remainder to the use of the second and other sons of the said Lord *Henry Bruce* successively in tail male, with remainder to the use of the Petitioner's uncle, Lord *Robert Bruce*, for his life without impeachment of waste, with similar remainders over in strict settlement in favour of his male issue, with remainders over in strict settlement in favour of the said Lord *Frederick Bruce* and Lord *Charles Bruce*,

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two other uncles of the Petitioner, and their male issue, with an ultimate remainder to the use of the Petitioner in fee simple. And the said Lord *Frederick Bruce* and *Hugh Mewburn-Walker* were thereby declared to be the trustees of the settlement for all the purposes of the *Settled Land Act*, 1882.

Simultaneously with that re-settlement an arrangement was made for the sale of the *Yorkshire* estates, with the view, it was said, of securing the continuance in the *Ailesbury* family of the *Savernake* estate by paying off a portion at least of the incumbrances upon it. *Ernest*, Marquis of *Ailesbury*, died on the 18th of October, 1886, whereupon the Petitioner assumed the title of Marquis of *Ailesbury*, and became tenant for life in possession of the *Savernake* estate (subject to the then existing incumbrances thereon), and shortly afterwards the *Yorkshire* estates were sold in pursuance of the arrangement already mentioned, the proceeds being applied in payment of several of the incumbrances on the *Savernake* estate, and also in payment of large sums to the Petitioner and his mortgagees and other creditors.

The position of the *Savernake* estate, as regarded the income and the charges upon income and *corpus*, at the time the Petitioner became tenant for life in possession, and after the discharge of various incumbrances by the sale of the *Yorkshire* estates, was as follows. The net annual rental, after payment of outgoings in respect of rates, taxes, tithes, insurance, repairs and general estate charges, was about £11,600, but by jointures to the total amount of £8500, and by the interest at 4 per cent. on two mortgages on the *corpus*, both dated in 1863, of £30,000, and £25,000 (the total annual sum for interest amounting to £2200), the net rental became reduced to £900 a year, with the prospect of still further diminution through a probable fall in rents owing to the prevailing agricultural depression. Under these circumstances it was obvious that the position of the owner of this estate—an estate which was referred to in the evidence as "the biggest white elephant ever known"—could only be maintained, if at all, by the exercise of the utmost care and self-denial. The Petitioner, however, was a young man of extravagant habits, and soon after coming into possession, he

mortgaged his life estate to one *Samuel Lewis*, a money lender, for £212,000, and interest at 5 per cent. per annum. *Lewis* had commenced an action for foreclosure, and had obtained the appointment of a receiver who was now in receipt of the rents and profits of the estate. *Lewis* was still continuing to make advances to the Petitioner, who it appeared was mainly dependent on these advances for his daily maintenance. He had incurred debts to various persons to a very large amount besides, and a receiving order in bankruptcy had been made against him, the proceedings under it being only suspended to await the result of the present application. During those proceedings a meeting of the creditors was held, at which *Lewis* was present, and a scheme was then proposed for raising a loan upon the security of the Petitioner's life interest in the *Savernake* estate, or in the proceeds thereof, and on policies on his life, so as to enable him to pay off *Lewis* and his other creditors in full. The meeting was adjourned for the reason above stated.

The advantages of the proposed sale as regarded the pecuniary position of the Petitioner himself were said to be as follows. The present net income of the estate was, as already stated, £900 a year only, liable to still further diminution; but this was wholly insufficient to meet the charges on the Petitioner's life estate, which charges would more than exhaust all the net income for the whole of the Petitioner's life, even after the jointures had fallen in, and so leave him penniless. If, however, the sale were carried out, the investment of the purchase-money of £750,000 would produce a net income (after keeping down the interest on the existing mortgages and the jointures) of £17,000, instead of £900, a year. This would suffice to pay interest and premiums on the loan proposed to be raised for paying off *Lewis* and the other creditors, and leave an ultimate clear surplus for the Petitioner himself, which was calculated at £550 a year at once, gradually increasing to a very substantial amount as the existing jointures should fall in.

Lord *Henry Bruce*, Lord *Robert Bruce*, Lord *Frederick Bruce*, Lord *Charles Bruce*, and all the other remaindermen at present in existence, were Respondents to the petition, and opposed it, their desire being, as they said, to preserve *Savernake House*,

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park and forest in the family. Mr. *Mewburn-Walker*, co-trustee of the settlement with Lord *Frederick Bruce*, was also a Respondent, but was in favour of the sale.

The question was whether, having regard to all the circumstances of the case, the sale sought to be sanctioned by the Court was one which the Court ought to sanction under sect. 10 of the *Settled Land Act*, 1890.

In support of the petition, affidavits were filed by Mr. *Mewburn-Walker*, and also by Messrs. *Henry Herbert Smith* and *Frederick George Chinnock*, two land agents and surveyors of great experience, who stated that the sum of £750,000, which included the timber on the estate valued at £123,000, was a very good price—in fact considerably in excess of their own valuation—and very advantageous to all parties interested in the estate, whether tenant for life or remaindermen: that it was essential for an advantageous sale of the whole estate that the mansion-house, with the pleasure grounds, forest, parks, and lands occupied therewith should be sold with the remainder of the estate: that they were all connected together and practically in a ring fence, and that without the mansion-house, forest and parks, the farms and other lands would fetch a comparatively small sum, while, if the mansion-house, forest, &c., were sold without the rest of the estate, the former would lose the characteristic quality of being the centre of a great landed estate. It was further deposed by the Petitioner's witnesses, that for several years every effort had been made to sell the estate, but without success until the present offer was made by Lord *Iveagh*, and that in their opinion, if the present opportunity for sale were lost, no chance of so favourable a contract was likely to recur: also that it would be a vast benefit to the agricultural and industrial condition of the estate if the ownership were transferred from an impoverished and impecunious landlord to a wealthy and energetic person; and that in the present depressed state of agriculture the demand for the labour of the rural population was small, and the presence of a resident wealthy proprietor ready to keep the estate in good condition and to employ the labour at hand, would make all the difference between hardship and comfort to a very large number of inhabitants, of

whom there were said to be from 4000 to 5000 resident on the estate.

In opposition to the petition, affidavits were filed by some of the remaindermen, stating that the late Marquis consented to the sale of the *Yorkshire* estates only upon the express condition that the *Savernake* estate should be resettled, and go with the family title and dignities, and they charged the present Marquis with a gross breach of faith in now attempting to sell the *Savernake* estate. One of the remaindermen stated by affidavit that the price proposed to be paid for the estate was insufficient, but this was unsupported by evidence of any experts. Lord *Henry Bruce*, who was the heir presumptive, on the death of the present Marquis without male issue, to the title and dignities, stated by affidavit that, having regard to the receiving order made against the Petitioner and his mortgage to *Lewis*, he, the deponent, believed that the Petitioner had now no beneficial interest whatever in the estate, and that the contract entered into by him for the sale of the estate had been entered into by him under pressure from *Lewis* and his other creditors, and under threat of making him bankrupt if he declined to concur in the sale. In his affidavit in reply the Petitioner denied that he ever promised or agreed with the late Marquis that he would not endeavour to sell the *Savernake* estate. He admitted that he was in embarrassed circumstances, and that a receiving order had been made against him; but he denied that the sale had been made under pressure from his creditors, stating that he had been endeavouring to sell the estate long before any receiving order was made against him. He further stated that he had had practically no income from the estate, and no material income was to be expected from it for a long while to come, having regard to the incumbrances and jointures; that, notwithstanding the heavy outlay, the estate was not kept up as it should be, and many of the trees in the forest were in a decaying state; and that under present circumstances he could neither keep up the estate nor pay his debts. He further expressed his belief that all parties would be benefited by the sale; that the tenants would be benefited by having as a resident landlord a very wealthy man; that he, the Petitioner, and all future remaindermen, whether for

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life or otherwise, would be in possession of a largely improved income, and that, in particular, the next tenant for life in remainder, Lord *Henry Bruce*, would be in a much better position to support the title and dignities; and lastly, that all the incumbrancers on his, the Petitioner's, life estate concurred in the sale.

In cross-examination upon that affidavit the Petitioner said 'Mr. *Lewis* did not request me to sign this contract. I did so because I want to pay my creditors and people I owe money to; it is a matter of great regret to me that the *Savernake* estate should be sold."

It appeared that the mansion-house contained a number of valuable heirlooms, but these were not included in the sale to Lord *Iveagh*. One of these heirlooms consisted of a well-known picture by *Murillo*, stated to be of very great value. No provision had been made for the custody of the heirlooms, and the Petitioner admitted, when under cross-examination, that it had not occurred to him until the previous day how they were to be disposed of.

Lord *Henry Bruce*, the first tenant for life in remainder under the settlement, was stated to be a gentleman of great wealth, and capable of keeping up the mansion-house, &c., in a suitable manner if he succeeded to the family title and dignities.

The petition was heard before Mr. Justice *Stirling* on the 7th of August, 1891.

Hastings, Q.C., and *Fossett Lock*, for the Petitioner:—

The proposed sale is for the benefit of all parties. The price offered is a fancy one, and if the sale is carried out there will be an available income for the tenant for life after providing for the jointures and other charges. The objections to the sale are sentimental, and such as will always exist where the sale of an old family estate is in question. But such objections cannot override the statute under which the Petitioner is entitled to the order for which he asks: *Hood & Challis* on the *Settled Land Act* (1); *Marquis Camden* v. *Murray* (2). It will be said that the tenant for life has incumbered his life estate, and that the sale will not

(1) 3rd Ed. p. 416. (2) 27 Sol. J. 652.

be for his benefit, but for that of his incumbrancers. That is immaterial, inasmuch as a bankrupt tenant for life may sell: *In re Sebright's Settled Estates* (1). In that case the mortgagees objected, here they all concur. It is suggested that there was some sort of family arrangement under which the Petitioner is under contract not to sell the mansion-house and estate, but he cannot bar his right to sell under sect. 15.

[STIRLING, J.:—Is it not a circumstance to be treated as of weight that all the family except the Petitioner, who has parted with everything he has, object to the sale?]

If the sanction of the Court is refused, it will be very like turning the section into a provision that the mansion-house shall not be sold unless the persons next entitled in remainder consent.

No doubt the Court will scrutinize the contract: *Cardigan* v. *Curzon-Howe* (2). Here the Petitioner has consulted the interest of all parties by getting the best possible price, and if the sanction of the Court is refused the tenant for life will be thrown back upon his absolute power to sell the whole estate except the mansion-house, and the remaindermen will thereby suffer considerable loss.

Muir Mackenzie, for Mr. *Mewburn-Walker*, one of the trustees, consenting to the sale.

Sir *H. Davey*, Q.C., and *G. Henderson*, for Lord *Henry Bruce*, the first tenant for life after the Petitioner:—

No ground is shewn to induce the Court to sanction the proposed sale. The Respondents do not desire to interfere with the Petitioner in selling what he has a right to sell.

Sect. 15 was repealed and re-enacted by sect. 10 of the Act of 1890; therefore, the question is not whether the tenant for life has duly exercised his discretion, but whether, under the circumstances, the Court will permit him to do that which, without such permission, he could not do. The duty of the Court is not merely ministerial, but it has to exercise its discretion in the interest of all parties concerned.

(1) 33 Ch. D. 429. (2) 40 Ch. D. 338.

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The mere increase of income is not the test, because the mansion-house does not, *ex necessitate rei*, produce income at all. The mere money value cannot be the only consideration to which the Court will have regard. It is bound to take into consideration the sentimental side of the question, and will not permit the sale of the only mansion-house now belonging to the family in order to relieve the tenant for life from his pecuniary embarrassments; and though the tenant for life cannot, of course, contract himself out of the statute, yet the Court will, in considering all the circumstances, have regard to an arrangement—the object of which was to keep this the only remaining mansion-house in the family.

In *Marquis Camden* v. *Murray* (1) the application was for the sale of only one of two family mansions. The Petitioner here is not in a position, having regard to his financial embarrassment, to freely exercise his unfettered discretion. He is in the hands of his creditors. It is proposed to clear him by raising a sum of money upon terms which will leave him with a very small income indeed. Is that such a benefit to the tenant for life as will induce the Court to override the provisions of the settlement? The mere increase of income is not sufficient to induce the Court to sanction the sale, having regard to all the circumstances.

The persons next entitled in remainder are wealthy, and are willing, if necessary, to undertake the burden of this mansion-house.

The language of sect. 53 has received judicial interpretation in the case of *In re Earl of Radnor's Will Trusts* (2). The Petitioner is not in a position, within the meaning of the section, to exercise an unbiassed and unfettered discretion; and the sale ought not to be allowed.

Buckley, Q.C., and *C. A. James*, for Lord *Frederick Bruce*:—

The objection to the sale may be grounded on sentiment; but if so, it is sentiment supported by Act of Parliament, for the statute only gives the right to sell the mansion-house under certain safeguards. There is nothing here to shew that the rest of the property could not be sold for a sum sufficient to support

(1) 27 Sol. J. 652. (2) 45 Ch. D. 402.

the dignity of the family and keep up the mansion-house. By sect. 53 the tenant for life is to have regard to the interests of all parties, and to be in the position of a trustee. Before making an order under sect. 15, the Court must take into consideration every material circumstance. The tenant for life has not done that which Lord *Esher*, in *In re Earl of Radnor's Will Trusts* (1), says he ought to do—viz., considered all the circumstances of the family, and of each member of the family who may be affected by what he is about to do, in the way that an honest outside trustee would consider them.

Of course, the Petitioner could not contract himself out of the statute, but that is not material. The question is, whether the Court will not have regard to the family arrangement: *Re Beaumont's Settled Estates* (2).

Stock, for Lord *Charles William Bruce*:—

It is not intended to sell the heirlooms in the mansion, yet no provision has been made for their safe custody. The sale ought not to be sanctioned.

Hastings, in reply:—

The main argument against the Petitioner is that he will reap no benefit from the sale; but that proves too much, because it must also affect his power to sell the estate without the mansion-house, which is expressly given by the statute.

In *In re Earl of Radnor's Will Trusts* (3) Mr. Justice *Chitty* said that, as a general rule, he thought the circumstance that the tenant for life had incumbered his life estate ought to be excluded from consideration by the Court on a question of granting or refusing an order sanctioning a sale of heirlooms.

The statute does not mean that a tenant for life, before selling, must consider whether the remaindermen will like it. If the sale is not allowed the mansion-house and property must go to ruin. The estate without the house will sell very badly.

Aug. 10. STIRLING, J. (after stating the facts, said that upon the evidence it appeared that the net rental of the *Savernake*

(1) 45 Ch. D. 417. (2) 58 L. T. (N.S.) 916. (3) 45 Ch. D. 410.

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estate, after payment of the existing charges and jointures, was reduced to £900 a year, and that if, as was possible, the gross rental should be further diminished from any cause, any surplus would soon vanish altogether. His Lordship then pointed out that, supposing the sale was carried out, then, according to his calculation, the charges on the income of the £750,000 purchase money invested at 4 per cent. would absorb the whole of the income with the exception of £550 a year. His Lordship then proceeded):—

It does not appear, therefore, that the position of the Marquis himself would be at all improved by the proposed sale, so far as he is concerned. Any benefit which accrues from it will be reaped by his creditors rather than by himself.

Sect. 10 of the *Settled Land Act* of 1890, provides that "the principal mansion-house on any settled land . . . shall not be sold . . . by the tenant for life without the consent of the trustees of the settlement or an order of the Court." The trustees are divided in opinion: Mr. *Mewburn-Walker*, who is the Petitioner's solicitor, is in favour of the sale; Lord *Frederick Bruce*, who is a remainderman, is against it. Under these circumstances the present petition has been presented.

Sect. 37 of the *Settled Land Act* of 1882, enables a tenant for life of settled land to sell personal chattels or heirlooms settled on trust so as to devolve upon land; but it provides that such a sale shall not be made without an order of the Court.

The duties of the tenant for life in the position of the Marquis here on the occasion of such a sale have been very recently considered by Mr. Justice *Chitty* and the Court of Appeal in a case of the *Earl of Radnor's Will Trusts* (1), and the judgments in that case appear to me to throw much light on the duty of the tenant for life and of the Court in such cases as the present. At p. 407, Mr. Justice *Chitty*, in a passage which has received the approval of the Court of Appeal, says this: "I desire to repeat here what I have said before, that this controlling power of the Court is a discretionary power, and that it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which

(1) 45 Ch. D. 402.

vary greatly. For myself I say emphatically that this discretion ought not to be crystallized, as it would become in course of time by one judge attempting to prescribe definite rules with a view to bind other judges in the exercise of the discretion which the Legislature has committed to them. This discretion, like all other judicial discretions, ought as far as practicable to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each particular case." I am bound by that expression of opinion; but I may say that if I were required to express my own opinion, I should entirely concur in it.

I now pass on to the judgments delivered in the Court of Appeal. The present Master of the Rolls says this (1): "Let us see whether there is anything in the Act which will shew us how this discretion of the tenant for life and the discretion of the Court, or, if you please, the combined discretion of the two, ought to be exercised. I think that sect. 53 does so: 'A tenant for life shall, in exercising any power under this Act'—that includes the power under sect. 37,"—and also the power under sect. 10 of the *Settled Land Act*, 1890, which is only a modification of a similar clause to be found in the Act of 1882—"'have regard to the interests of all persons entitled under the settlement'—he shall have regard to the interests of all—'and shall, in relation to the exercise thereof by him, be deemed to be in the position, and to have the duties and liabilities, of a trustee for those parties;' and when the section says he is to be deemed, for the purpose of exercising his discretion under sect. 37, to be a trustee for all parties, I think that that includes himself as one of the *cestuis que trust*. He is, consequently, put in the position of a trustee for himself and all the others—not for himself or all the others, or each of all the others, but for himself and all. It seems to me, therefore, that he is bound in the first place to exercise his discretion as if he were an independent trustee for himself and all the other members of the family—that is, he is to exercise his discretion as a fair and honest and careful trustee would under the circumstances; and the Court ought, I think, to view the matter precisely in the same light." A little further on he says: "The tenant for life, then, has in the

(1) 45 Ch. D. 416.

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first place to exercise his discretion in the way I have said, in the case and at the time and under the circumstances (I say that advisedly) in which he is placed. He must take all the circumstances of the family, and of each member of the family who may be affected by what he is about to do; he must consider them all carefully, and must consider them in the way that an honest outside trustee would consider them; then he must come to what, in his judgment, is the right thing to do under the circumstances—not the best thing, but the right thing to do. When I say 'not the best thing' I mean this: if somebody afterwards comes and says, 'Although you have done what nobody can say is wrong, yet somebody else might have found out a better way of doing the thing,' that would be immaterial." Again, further on, his Lordship proceeds (1): "I think that a fair and honest trustee would look at it thus—'Is it right, under the circumstances of the particular case before me, that at this time and under these circumstances the heirlooms, or the part of them which it is desired to sell, ought to be sold at all?' There may be cases in which they ought not, and I should think that a fair and honest trustee would lean against selling the heirlooms; for I agree with Sir *Horace Davey* that *primâ facie*, unless something in the circumstances justifies it, an honest trustee would be inclined to keep the heirlooms where the person who has settled them desired that they should be kept; therefore, the leaning would be against a sale." I pause there to remark that in the case of an old family mansion-house the leaning against a sale would, as it seems to me, be somewhat greater than in the case of heirlooms. As was observed by Mr. Justice *Chitty* in the case of the *Marquis Camden* v. *Murray* (2) the Court would be very reluctant to put in force an order for the sale of an old family estate; and like considerations would weigh in the case of an old family mansion under the *Settled Land Act*, and with none the less force that it had been proved that the principal mansion-house desired to be sold was one of two principal mansions formerly belonging to the family, and that it had been resettled on the occasion of the sale of the other. Lord *Esher* continues: "But that is not all. If the trustee has to consider whether he would sell—I mean a

(1) 45 Ch. D. 419. (2) 27 Sol. J. 652.

trustee for the tenant for life as well as for all the others—he must take into consideration the circumstances of the tenant for life; he would take them into consideration as the head of the family; and it is most material that the head of a great family, or of any family, should be in a position to do his duty to the whole family. Therefore, it is impossible to put out of consideration the circumstances of the particular tenant for life. If he cannot keep up the family property, if he cannot live in the family house without some assistance from the sale of the heirlooms or any part of them, that ought to be taken into consideration, and very much into consideration. The position of the next tenant for life—the one, that is, who comes in next to the tenant for life himself—is very material, and it ought to be considered what will be his position if he comes in. Will he be able to keep up the family property? Will he be able to keep up the place as head of the family, which he will be? Next after him, of course, will come his children; even though they are not born, they are to be considered. After that, but certainly it cannot be said with the necessity of dealing with them precisely in the same manner, will come the others who may become tenants for life under the settlement; you must consider them all. It is not that you are to consider each of them separately; you are to consider each of them separately in one sense, but you are to consider the whole position of the family altogether." Then his Lordship says (1): "I would say this: supposing the tenant for life who is to exercise the discretion is a man of wealth *aliunde* or outside the property which is under the settlement, and with regard to which he has a discretion, and he therefore, by means of his other property, can keep these family estates and heirlooms all intact, that would be a strong reason, if something else did not exist, why a trustee would say: 'No, I lean against your selling the heirlooms; you can keep them up; therefore, I, in the exercise of my duty, say that you should not sell them.'" Then he goes into a discussion of the various circumstances which might affect the judgment of the trustee having regard to wealth outside the settlement, and he finally says (2): "When it comes to the Court, the Court will take all the

(1) 45 Ch. D. 420. (2) 45 Ch. D. 421.

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circumstances of the particular case into account—such circumstances as I have enunciated by way of example, and which are not within a hundredth part of being all the circumstances which might arise in each particular case—and having taken them all into consideration the Court would take care that no absolute injustice was done to any one. But the Court would take into account this—that it might be less beneficial to one than to another; it would take all the circumstances of the family with due care into consideration, and would act as an honest and careful trustee would in agreeing to the discretion which has been first exercised by the tenant for life." Lord Justice *Lindley* gives a judgment to a similar effect, and he says (1): "As to the function of the Court. Before the Court can properly sanction any proposed sale it must be satisfied that such sale is reasonable and proper; and before coming to any conclusion one way or the other the Court ought to have regard to the interests of all parties entitled under the settlement. Whether having regard to these interests any particular sale is reasonable and proper must depend on all the circumstances of the particular case. The views of the tenant for life naturally count for much; the views of those who differ from him ought not to be excluded from consideration." With the assistance derived from those observations, I proceed to consider the present application. In the first place I desire to say that I am quite satisfied that £750,000 is the full value of the estate. That is sworn to by two land agents of great experience, Mr. *Henry Herbert Smith* and Mr. *Frederick George Chinnock*. No expert evidence has been adduced on behalf of the Respondents. One of the remaindermen puts the full value at a larger sum; but his opinion appears to me to be outweighed by those of the two gentlemen whom I have just named. If, then, the sole question were whether the full pecuniary value is being obtained for the estate, the decision must be given in favour of the Petitioner.

But the passages I have just read from the judgments in *Earl of Radnor's Will Trusts* (2) establish that this is not the sole point to be regarded. I have to ask the question, Is the Petitioner acting as an independent trustee for himself and all the

(1) 45 Ch. D. 424. (2) 45 Ch. D. 402.

members of the family? Is he exercising his discretion as a fair, honest, and careful trustee would do under the circumstances? Now the Marquis is not favourably situated for the exercise of an independent judgment. He is dependent for his daily maintenance on Mr. *Samuel Lewis.* He admits that Mr. *Lewis,* doubtless for reasons which are not difficult to understand, is very anxious that the contract should be carried into effect. I apprehend that, under these circumstances, the Court ought to scrutinize with some care the grounds on which the Petitioner asks the sanction of the Court to the sale. As I have said, the benefit to be derived from the sale will be enjoyed by the creditors of the Petitioner rather than by himself. He, so far as appears, will be in no better position to fulfil his duties as the head of the family. Again, every living person interested under the settlement is opposed to the sale. Each may be taken to be actuated by a desire which is recognised by common feeling in this country as being worthy of respect, that of enjoying in his turn the possession of the unique and historical home of the family for more than 200 years. An honest, independent trustee would, I think, have regard to this feeling, and endeavour, if possible, to satisfy it. Has the Petitioner made any attempt so to do? I cannot find that he has. In his affidavit he simply relies on the largely increased income which will be enjoyed by all future remaindermen. [His Lordship, after referring to the evidence of Messrs. *Smith* and *Chinnock,* continued:—] I have no doubt that without the mansion-house, the forest and park and the other portions of the estate would sell less advantageously; but the question is whether part of them might not be sold so as to put the successive owner of the property and the family, regarded as a whole, in a better position, and so as to preserve to the family that on which every one except the Petitioner, if, indeed, he be an exception, sets great value, and which even the Petitioner regrets to part with. On that question the evidence before me throws no light.

Further, there are, as it appears, in the mansion-house a number of heirlooms, including, at least, one picture of some reputation, which are not included in the contract for sale, but are said to be of considerable value. That value is unascertained,

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and the Marquis of *Ailesbury*, the Petitioner, admitted, on cross-examination, that it had not occurred to him until the day before how these heirlooms were to be disposed of, and that no provision had been made for their custody, a circumstance, perhaps, not without significance as regards the amount of care the Petitioner has bestowed on this sale. Still less does it appear to have been considered whether any of these heirlooms could be made available to improve the pecuniary position of the Petitioner and his successors. The matter does not rest there. It appears to me, and in that I am supported by the judgment of the Master of the Rolls, that an independent trustee would pay some respect to the position of the tenant for life and his successors as regards wealth outside the settlement. How stands that consideration in the present case? The Petitioner is utterly insolvent. Indeed, he is all but adjudicated bankrupt. His life interest is incumbered to the full extent. He has squandered a large sum which, to say the least, would have gone far to enable him to maintain his position and dignity as the head of a great family. There is no reasonable probability of his ever retrieving his position. He is still a young man, but is at present childless. The next remainderman, Lord *Henry Bruce*, is a partner in a large and lucrative business, and may not improbably succeed in acquiring that wealth which the Petitioner has done nothing but dissipate. The more remote remaindermen are said to have, at least, expectations of wealth from sources other than the family estate. There is no evidence that the Petitioner, in exercising his discretion, has given the slightest consideration to this circumstance. I am bound to do so. Looking at the matter from the point of view of an independent and careful trustee, and considering therefore, as best I can, all the circumstances of the case, I come to the conclusion that the proposed sale, however desirable it may be for the creditors of the Petitioner, is not one in which due regard has been paid to the interests of all the parties entitled under the settlement. I am, therefore, unable to sanction the proposed sale, and I must dismiss the petition.

G. A. S.

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From that decision the Petitioner appealed.

The appeal was heard on the 7th and 12th of December, 1891.

Since the hearing of the petition before Mr. Justice *Stirling*, one of the jointresses had died, thus setting free £1000 a year to be added to the above-mentioned net rental of £900 a year.

Rigby, Q.C., *Hastings*, Q.C., and *Fossett Lock*, for the Appellant:—

For some time past endeavours have been made to find a purchaser for this property, but without success. Now, Lord *Iveagh* has offered £750,000 for it, a sum which exceeds the amount at which the property has been valued, and never may be offered again. The learned Judge of the Court below was quite satisfied that this was the full value of the estate, but he refused to sanction the sale mainly on the ground that, owing to his embarrassed position, the Marquis would derive no real advantage from the sale, and that it would be his creditors only who would benefit by it, as he would himself have a surplus income of only £550 a year; but, under the circumstances, owing to the death of one jointress, he would now have a clear income of £1000 more than that, which will be considerably increased in the future, as the other jointresses die. But is the relief which the proposed sale, and the arrangements consequent upon it, will bring to the Marquis from the load of debt that is weighing him down, to go for nothing? He has mortgaged his life interest for £212,000 at 5 per cent. The mortgagee has brought a foreclosure action, and a receiver is appointed who will manage the estate in the interest of the mortgagee-creditor, and must remain in possession during the whole of the life of this young man, who is not thirty years of age. There is timber on the estate valued at £123,000, and as the tenant for life is not impeachable for waste, the receiver will be entitled, and in his own interest be bound, to cut down all he can. Under such circumstances the estate must deteriorate, and would come to the remainderman with diminished value. Lord *Ailesbury* is further indebted to creditors to a large amount, and a receiving order has been made against him in bankruptcy, which the creditors are delaying to enforce until this issue is decided. So that while he will be a pauper if this sale is not sanctioned, if it is he will be a free

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man with an income, at present modest, it is true, but which will, by degrees, be increased as the charges are paid off, and the jointures fall in. So far as regards his own interest, therefore, to sell to Lord *Iveagh* would be an eminently proper and prudent thing to do. Can it be said that the sale is not also advantageous for the remaindermen? The Marquis is himself one of the *cestuis que trust*; the births of children to him would oust all the remaindermen now before the Court. None of those remaindermen can reach residential occupation in his lifetime, and he may survive them all. If he has no children, and these remaindermen, or any of them, survive him, instead of succeeding to funds representing the best purchase-money which can be obtained, and which might be invested in other lands, they will succeed to a starved, impoverished, and deteriorated estate, which even now is described as a "white elephant."

Sir *H. James*, Q.C., and *Muir Mackenzie*, for Mr. *Mewburn-Walker*, a Respondent and one of the trustees, in support of the appeal.

Sir *H. Davey*:—

Mr. *Mewburn-Walker* is not an appellant, and counsel cannot be heard on his behalf.

LINDLEY, L.J.:—

As regards the general rule, Sir *Horace Davey* is right. A Respondent is not, as a rule, entitled to address the Court in support of an appeal, but Mr. *Mewburn-Walker's* position as a trustee is a peculiar one, and the Court is desirous of hearing what counsel on his behalf has to say.

Sir *H. James*:—

By the *Settled Land Act* of 1882, s. 37, heirlooms may be sold by the tenant for life, but not without an order of the Court; and in *In re Earl of Radnor's Will Trusts* (1) it was held that in exercising this power the tenant for life is, by force of sect. 53, in the position of a trustee with a discretionary power,

(1) 45 Ch. D. 402.

and must have regard to the interests of all persons entitled under the settlement, the interests of those remotely entitled being of less weight than the interests of those nearer to the succession. The mansion-house and demesnes of settled lands are in the same position as heirlooms, and the same principles apply to the sale thereof. Accordingly, what must be looked at are, first, the interests of the present tenant for life; next, those of his children; and then, and not until then, those of the remaindermen. The present tenant for life will probably outlive any of the immediate remaindermen who are now opposing him; and it cannot be contended that he would benefit by the retention of the estates. Leaving out of consideration the children, to whom, however, the same remark applies, and coming to the remaindermen who oppose the sale, the desire to retain an historic mansion should no doubt receive consideration. But the objectors may never succeed to it, and, if they do, in what state will they find it? The estate will have been in the hands of a hostile mortgagee and a bankrupt tenant for life not impeachable for waste. There is no duty on the latter to maintain the mansion-house, which will become a dilapidated monument of family honour. Creditors are not likely to take on themselves duties they are not bound to perform. There are on the estate 95 farms, 1000 cottages, and a population of 4000 or 5000 people. It was the intention of these Acts that some consideration should be shewn not only to the owners of estates, but to the public also, and specially to those persons who are actually living upon and possibly are unable to leave the estate. If the owner lacks the power to fulfil his duties ought he not to part with the land? The trustee ought to consider the benefit of the estate; and that the estate would benefit by passing into the possession of a wealthy resident landlord is incontestable. There can be no doubt that if this estate is sold at all it should be sold altogether. Once this willing purchaser is dismissed, another may not be found for generations. If not sold the estate must, year by year, become impoverished and fall in character and estimation, and, it may be, to such an extent that any sentimental value which now attaches to it will entirely disappear.

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Sir *H. Davey*, Q.C., and *G. Henderson*, for the respondents, the remaindermen, other than Lord *Frederick* and Lord *Charles Bruce*:—

The argument for the Appellant ignores the difference made by the Legislature between the mansion-house and other settled land.

The mansion-house is, by virtue of sect. 10 of the *Settled Land Act*, 1890, expressly placed in a different position from the rest of the estate; its sale does not rest on the mere will of the tenant for life. It is not sufficient that the tenant for life should think that a sale of the estate will be for the benefit of himself and the remaindermen, or will result in a larger income; it might be said of every family estate that, if sold, a larger income would be obtained. It is on that ground alone that the Appellant rests his case.

[LINDLEY, L.J.:—One consideration here is that a sale would be for the benefit of the tenants.]

That may be taken into consideration, no doubt; but the main consideration must be the interests of those for whom the tenant for life is a trustee.

Considerable weight, therefore, ought to be given to the interests of the remaindermen in this case. They are all strongly opposed to the sale, and say there is no necessity for it beyond the circumstances created by the tenant for life himself.

[FRY, L.J.:—Is it for the interests or honour of the family that the estate should remain in its present condition?]

No; and this is felt acutely by the remaindermen. They hope to retrieve the position of the family, and their desire is that the family mansion-house should be retained. By the Act the tenant for life is required to use a discretion in the exercise of his powers, including his power of selling the mansion-house. Under sect. 53 he is to regard the interests of all parties under the settlement. He is to have regard to the persons entitled in remainder as well as to himself. We say the remaindermen are the primary persons to be regarded.

[FRY, L.J.:—I am not sure that the discretion of the Court, or

of the trustees of the settlement, is as limited as the discretion of the tenant for life. Is it not conceivable that the trustees, or the Court, may take a wider view than the tenant for life can take of what is for the interest of all parties?]

It is for the tenant for life himself—not for the Court—to exercise the discretion, though that discretion may be controlled by the Court. The scheme of the Act is that the tenant for life shall have a general power to sell, and that in the exercise of that general power he is to have regard to the several persons interested under the settlement, and to be subject to the liabilities of a trustee.

[BOWEN, L.J.:—Your view is that sect. 53 does not confine the tenant for life merely to the question as to what is best for the material interests of the remaindermen?]

That raises the question, what are in reality the material interests of the remaindermen? The consideration is not whether the mansion-house will, by a sale, produce a larger income. The enjoyment of the mansion-house, as such—that is, as a home for the family—is what forms part of the settlement; and parting with that enjoyment is just as much an interference with the material interests of the remaindermen as interfering with a subject-matter that produces income. Income is not the only question—indeed, under the proposed sale, the tenant for life will not in fact get any increase of income.

Sect. 53 merely imposes a fetter on the exercise of the discretion given to the tenant for life. Being in the position of a trustee, he is bound to exercise his discretion as if he were an independent trustee for himself and all the other members of the family—that is, to act as a fair and honest and careful trustee would under the circumstances: *In re Earl of Radnor's Will Trusts* (1). The first thing he has to do is to exercise his discretion. If he is in such a position as to be unable to exercise an unfettered or unbiassed discretion, the Court will look narrowly whether there has been such an exercise of discretion as the Court will sanction. Unless that discretion has been exercised, the Court has no power; therefore, if we shew that the

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discretion has not been exercised by the tenant for life but by others, the substratum of the application is gone. In the case of a sale of the mansion-house, the Court does not exercise the power of sale; it merely sanctions, under sect. 10 of the Act of 1890, which corresponds to sect. 15 of the Act of 1882, the exercise of the power by the tenant for life. This petition, in substance, asks for the sale of the mansion-house for the benefit of the money-lenders who have fostered the extravagance of the tenant for life and provided him with the means of squandering the family property. It is a strong thing to ask the Court to undo the family arrangement deliberately entered into by the tenant for life with the late Marquis in 1885. It is a serious consideration whether, the estate having been reduced to its present condition by his own act, the tenant for life can force the hands of the Court and of the remaindermen by reckless conduct and extravagance. The conduct of the tenant for life cannot alter or prejudice the rights of the remaindermen. Those rights cannot depend upon the manner in which the tenant for life has dealt with the estate. It is not a case of a tenant for life who through misfortune finds the house too large for the estate, but of a tenant for life, who, after having put the material enjoyment of the settled mansion-house out of his own power by his own acts, endeavours to deprive others of that material enjoyment to which they are entitled equally with himself.

Then it is said that the house will not be kept up. It may not be kept up like a house forming part of a solvent estate, but it will be for the interest of the tenant for life and also of his creditors to keep it up so far as to produce income. Then no allowance has been made for the possible improvement of the estate; part of it consists of property in the town of *Marlborough*, and it is not improbable that this will improve. Then it is said that it is for the benefit of the tenants on the estate that they should have a good resident landlord; but the Court cannot ensure this. The tenants on this estate, as on any other, will be dependent on the views of the person who may happen to be their landlord. Whether he is a man of large property and kindly views is a mere accident, and cannot alter rights.

Buckley, Q.C., and *C. A. James*, for the Respondent, Lord *Frederick Bruce*:—

We support the views of the remaindermen, but we appear for Lord *Frederick Bruce* more especially in his position of a trustee. We submit that the principle to apply under the Act of 1882 is that it, as well as the previous *Settled Estates Acts*, recognizes the sentiment which prevails in great families in favour of preserving the family mansion. This is apparent from the course of previous legislation, which was careful to safeguard the interests of the persons taking after the tenant for life, especially with regard to the mansion-house: *Settled Estates Act*, 1856 (19 & 20 Vict. c. 120), ss. 2, 11, 17, 18, 32; *Settled Estates Acts*, 1858 and 1864 (21 & 22 Vict. c. 77, and 27 & 28 Vict. c. 45); *Settled Estates Act*, 1874 (37 & 38 Vict. c. 33), s. 3; *Settled Estates Act*, 1877 (40 & 41 Vict. c. 18), ss. 4, 6, 24–31, 46. Then the *Settled Land Act*, 1882, s. 15, and the *Settled Land Act*, 1890, s. 10, again exclude the mansion-house from the wider powers of the tenant for life, by giving the Court a veto upon any proposed sale of it by him, where it appears that the majority of the persons interested are opposed to the sale.

[FRY, L.J.:—By the Act of 1882 the tenant for life is made a judge of the interests of the remaindermen.]

Yes; but, as a trustee, he must exercise his discretion honestly and to the best of his judgment on behalf of the remaindermen, who are subject to his authority in that sense only. Here the tenant for life never really sat down and considered the interests of the remaindermen. He admits in his cross-examination that the reason he entered into the contract was that he "wanted to pay his creditors." As to the argument that the tenant for life must have regard to the interests of the tenants, we submit that the Court cannot have regard to the interests of occupiers at all, except so far as seeing that an old family mansion shall not fall into bad repair. The powers of sale, &c., given by the Act are created in the interests of the persons entitled to the "settled land," not in the interests of other persons who are not owners at all; and this is evident from the title of the Act. It is not an Incumbered Estates Act like the *Irish Incumbered Estates*

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Act, 1848 (11 & 12 Vict. c. 48), where the tenant for life or other owner is empowered to sell, for the propriety of a sale under that Act is a matter left entirely to the Court. Under the *Settled Land Act* a duty is imposed upon the tenant for life to exercise a discretion. The question he has to ask himself is this, "Is what I am doing for the interest or benefit of my *cestuis que trust*?" Antecedent to any exercise of its discretion by the Court there must be this inquiry, "Has or has not sect. 53 been complied with by the tenant for life, as trustee, considering the interests of all his *cestuis que trust*?" If not, the Court has no jurisdiction. The Court will be slow to give effect to a contract for sale by a limited owner who has brought the estate to a low condition by his conduct and extravagance. An improvident tenant for life cannot come and say, "The ground on which I ask for a sale is my own improvidence." Here the estate and mansion comprise the only property of the family. What is asked is that the family title and honours may be left without any mansion or any land. In substance, the application to the Court is made, not by the careless owner, but by a creditor of the careless owner. The suggestion that the house and estate, if not sold, will be allowed to fall into disrepair, is unfounded. It must be the interest of the tenant for life to keep them up, at least to some extent, so as to produce income. We submit that no case has been made out that, as against the wishes of the remaindermen, a sale should be made in the interests of the tenant for life and his creditors, and that the case is not brought within the principles by which the Court should be guided. If the learned Judge below is right in law, as we submit he is, this Court should not interfere with the exercise of his discretion.

Stock, for the Respondent, Lord *Charles Bruce*, a remainderman in the same interest.

Rigby, in reply:—

If this application is refused, the result will be that the mortgagee will foreclose, and, seeing that the estate is wasting, come in at once. This the Court will be powerless to restrain. It is greatly to the disadvantage of the estate and every one concerned

that it should remain in the hands of a tenant for life who has no longer a particle of interest in it, and who is absolutely destitute and dependent upon others for his maintenance.

With regard to the legislation of the old *Settled Estates Acts*, they consisted of two parts, management and sale. The mansion-house was excepted from the power of leasing because the estate could not be managed without the retention of its headquarters; but in the case of sale of the estate the same reason did not apply. When the estate was kept in hand, the mansion was protected; but if it was sold, the mansion went with everything else. The *Settled Land Acts* had a far wider scope, and one entirely different from that contemplated by the *Settled Estates Acts*. Are these new Acts to be brought down to the level of the old Acts? Is the discretion vested in the Court by the new Acts to be controlled by the wishes and desires of the remaindermen? The tenant for life has to regard their interests certainly, but the Court has a broader jurisdiction than the tenant for life. The scope of the *Settled Land Act*, 1882, is shewn by sect. 50. The fact of the tenant for life being a bankrupt does not prevent his exercising his powers under the Act. Had the Act intended that if the tenant for life was impoverished he should not have the powers given by the Act, it would have said so. A bankrupt tenant for life has the same powers as if he were not bankrupt. The policy of the Act is that nothing shall fetter the passing of the estate from a bankrupt tenant for life to others who can use it with advantage. That is a public consideration of great importance. If this estate is allowed to remain in its present hands it will sink into a still worse condition, which will not conduce to the honour or dignity of the family; and it is against public policy, having regard to the whole neighbourhood and to the tenants, that the estate should be so tied up as to bring about such a disastrous state of things. The remaindermen should not ignore these grounds of public policy. As to the property in *Marlborough* there is no reason to expect any improvement there which will make any substantial difference in the value of the estate, for the income produced from the property in the town is only £750 a year. We insist that it is against the interests of the public and the neighbourhood that a great

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estate like this should be held by the "dead hand" of an insolvent owner, of a person who has no interest whatever in protecting the tenants or seeing that the estate is kept up, and whose interests, on the contrary, lie in other directions. The object of the Act is that estates shall not remain in the possession of people who cannot do justice to them. The intention of the Legislature was to give immense powers in order that the consequences of the extravagance of a tenant for life should be visited exclusively on himself and not on the persons ultimately entitled to the estate. Though not an Incumbered Estates Act it provides the means of acquiring the advantages given by such an Act. In such a case as the present there ought to be the fullest power of relieving the estate from its difficulties, and the Court cannot interfere merely on the ground of the wishes and desires of persons who may or may not become entitled, and overrule the presumption that the mansion-house is, as a general rule, to take the same course as the rest of the estate. The Act makes no distinction between extravagance and misfortune. Whenever the tenant for life is in trouble, whether he may be bankrupt or merely unfortunate, it is for the public good that the estate should be handed over to some one who from his means can do justice to it. The tenant for life is absolutely unfettered as to all the settled lands except the mansion-house and demesne, and the Court should not take advantage of its jurisdiction over the mansion-house to destroy the sale of the rest of the estate. An estate cannot be sold advantageously without the house. The object of the Act is that, under favourable circumstances, they should go together. Here, under this contract, the pecuniary and material interests of all parties interested are safeguarded, and, moreover, considerations of public policy are in favour of the sale being carried out.

LINDLEY, L.J.:—

This is an appeal from a decision of Mr. Justice *Stirling*, refusing to make any order upon a petition presented by the tenant for life of the *Savernake* estate, in *Wiltshire* and *Berkshire*, and which petition asks, in substance, for the consent of the Court to a sale of the mansion-house and lands occupied with it,

as part of a larger sale, being the sale of the entire *Savernake* estate.

The estate in question is settled upon the present Marquis of *Ailesbury* for life, with remainder to his male issue, of whom there are at present none, with remainder to an uncle, Lord *Henry Bruce*, who is the first tenant for life after the present tenant for life, the Petitioner. Then there are the usual limitations to the first and other sons of Lord *Henry Bruce*, with remainder to another uncle, Lord *Robert Bruce*, for life, with similar limitations to his male issue. There are other limitations over, which I do not think it necessary to allude to at length, and the ultimate reversion is in the present Marquis in fee. The present Marquis is a gentleman of about twenty-eight years of age. He has managed, since he came of age, to get through a great deal of money, and I do not think he can be more compendiously described than as a spendthrift, who has ruined himself by his own extravagance and folly, who has brought disgrace upon the family name, and who has exposed the family estate to destruction for the rest of his life. He is not a person, therefore, with whom the Court is disposed to sympathise; but, on the other hand, the Court must not be deterred, through want of sympathy with him, from discharging the duties cast upon it by the statute.

The statute to which I refer is the *Settled Land Act*, 1882; and that statute, among other things, gives tenants for life power to sell settled estates, however long they may have been in families. There are clauses in it—I refer specially to sects. 50 and 51—which prevent the tenant for life from doing anything to incapacitate himself from exercising those powers. He is not deprived of them by becoming a bankrupt; he cannot release them; he can do nothing to destroy them, either by agreement or otherwise. Those sections are important to bear in mind with reference to the position of the present tenant for life. His power of sale under sect. 3 is controlled by sect. 53, upon which a great deal of this case turns. Sect. 53 runs thus: "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed

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to be in the position and to have the duties and liabilities of a trustee for those parties." That section has been the subject of much comment, and there are a number of decisions upon it. For the present purpose, I think it is sufficient for me to say that, in my opinion, the exercise or the discharge of the duty imposed by the section on the tenant for life does not affect the title. It is not a condition; it is a direction, the non-observance of which will expose the trustee to liabilities if he disregards the interests of the parties entitled under the settlement; and if there is any pecuniary loss by reason of that disregard of the section, that renders the tenant for life liable as if he were a trustee. The expression "have regard to the interests" means, I think, that he is to consider all the interests in the widest sense—not merely pecuniary interests, but wishes and sentimental feelings, and so on. But, after all, the tenant for life is the master of the situation, and he can override those interests; but if, by overriding those interests, or otherwise, he improperly sacrifices the pecuniary interests of those for whom he is trustee, he can be made pecuniarily liable. It appears to me, therefore, in this case that it cannot be said that, because this gentleman is bankrupt, or because he has parted with all his interest, and because, therefore, he has no further interest in this estate, it must be inferred that he is unable to sell; or that he has not had regard to the interests of the remaindermen as required by this section, whatever construction is placed upon the word "interests." In other words, it appears to me not to be right to give effect to Mr. *Buckley's* argument, and to hold that, when a tenant for life sells and comes to the Court and asks for its consent, the Court should withhold it, if he is shewn to be in such a position as to be unlikely to think of the interests of others. Here it has not been proved that he has not exercised his discretion, except in so far as an inference is to be drawn from the fact that he has parted with all interest in the property.

Now, unquestionably, there is nothing in the Act of Parliament which fetters the Court at all; there is nothing to be found in the Act which lays down any directions or any principles upon which the Court is to exercise its discretion. As stated by

Mr. Justice *Chitty* in *In re Earl of Radnor's Will Trusts* (1), and as emphasized by the Court of Appeal in that case, the Court is not disposed to fetter itself by laying down, or attempting to lay down, any rules for the exercise of its discretion. I take it that the duty of the Court is simple enough; it is to consider all the circumstances of each case, and including, as a very material part of those circumstances, the wishes of the remaindermen as well as the wishes or interests of the tenant for life. But there may be other circumstances—and in this case there are other circumstances—of a very important nature. The circumstances of this case which, apart from the interests of the tenant for life and remaindermen, are so important and, in my view, are paramount, are these. We must face the consequences of not assenting to this sale. What will those consequences be? We, as lawyers, as men of business, as men of experience, know perfectly well what evils necessarily result from handing over a great family estate to a mortgagee in possession whose only chance of obtaining payment is to sacrifice the interests of everybody to money-getting. That he should do so is only in accordance with human nature; and if we decline to sanction this sale, so far as we can foresee, the result will be to hand over this property for the rest of the life of the present Marquis—who is now only twenty-eight years of age, and a man who, as far as we can tell, has a fair chance of a long life—to the tender mercies of people whose only object will be to get out of the estate during his life every farthing that they can extract from it. The evil consequences of that are such that I for one, speaking for myself, dare not take the responsibility of bringing about such a state of things. If I were to do so I should be defeating to a great extent the benefits of the *Settled Land Act.* I agree, the *Settled Land Act* is not an Incumbered Estates Act; but we all know it is a most beneficent Act of Parliament brought in by one of the greatest lawyers and statesmen of his day for the purpose among other things of facilitating the sale of settled estates and rendering it unnecessary to introduce Incumbered Estates Acts into this country as in the case of *Ireland.* Looking at the main object of the Act, namely, to enable

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a limited owner of a settled estate to sell the estate where circumstances render a sale desirable if we find, as we do in this case, unfortunately, a large estate so situated that in all human probability everybody connected with it will be ruined unless it is sold, it appears to me to be the absolute duty of the Court to sanction the sale.

Now, to shew that I am not exaggerating the position of affairs, I will point out what will happen if we do not sanction the sale of this estate. A great part of the estate consists of timber to the extent of upwards of £100,000 in value, and the whole can be cut down except what is ornamental. Of course the purchaser can cut it down if he likes; but the tenant for life can, without our consent, sell everything except the mansion-house, provided he obtains its market value. He cannot sell the land apart from the mansion-house for anything like such a price as, with the mansion-house, it will fetch by the offer now made and which we have to consider; but he can destroy the estate by selling everything except the mansion-house for its market value. Further than that, we know, as I have already said, what infinite injury can be done, and is done day by day, to estates in this country when they are in the hands of mortgagees of tenants for life.

Now, those considerations appear to me to overpower all considerations on the other side; and sympathising, as I do most acutely, with the feelings of the remaindermen who oppose this petition, it appears to me that the moment the matter is brought before the Court, the Court must take a wider view than their wishes, and must take a far wider view than the Court did in dealing with the case of the pictures in *In re Earl of Radnor's Will Trusts* (1). With regard to Mr. Justice *Stirling's* judgment, Mr. *Buckley* was justified in saying that this Court should be careful in overriding the exercise of a discretion by the learned Judge below, unless the Court can see that what he has done is wrong. In my opinion, the learned Judge in this case has not given sufficient weight to the great difference between a large estate on the maintenance of which the welfare of a considerable population depends and two or three pictures; he has

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thought that this case is like that of *In re Earl of Radnor's Will Trusts* (1). I cannot find, from his judgment, that he addressed himself to the considerations which weigh so much with me. I think he regarded the case *minus*, if I may so say, those considerations, or, at all events, undervalued them so greatly that I cannot think he has estimated them duly.

Upon these grounds it appears to me that we ought to sanction this sale.

BOWEN, L.J.:—

It is impossible not to view with respectful sympathy the feelings of the remaindermen who object to this sale: but it appears to me that the Court below has not sufficiently considered that which must override the wishes of Lord *Henry Bruce* and those who support his views in this case. The Court below has not sufficiently considered the miserable condition in which this estate would be left during the time that must elapse before those who succeed to the present tenant for life come into possession and enjoyment of their rights. It may be, if we refuse our consent to this sale, that for fifty years, for anything we know, these estates will be, as has been well said during the argument, in the "dead hand" of an impoverished tenant for life, or of money lenders and strangers to the estate; and I cannot myself but feel that it would be taking a narrow view of the *Settled Land Act* of 1882, and the *Amending Act* of 1890, if we were to exclude from the consideration of the Court—when the Court is put in the position of acting on behalf of the family generally—the position and welfare of the tenants who farm and the labourers who till the soil.

Sect. 3 and sect. 15 of the Act of 1882 are the first sections to which we have to direct our attention. Sect. 3 gives a tenant for life the power of sale, and sect. 15 excepts the mansion-house and demesne lands held with the mansion-house, without the consent of the trustees or an order of the Court. I think the section in the Act of 1882 which excepts the mansion-house, a section which is substantially the same as that in the Act of 1890, is a section which recognises the value of sentiment and

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the possession of feelings by the remaindermen who are likely to succeed to the family mansion-house. It is, therefore, to my mind a matter to which great consideration necessarily must be given by those who have to consider the proposal for the sale of the mansion-house. The Court has, however, to exercise a discretion; and without attempting to lay down canons for the exercise of that discretion, which would be limiting that liberty of conscience which the legislature has given to all Courts, it seems to me right to explain the grounds upon which this Court is now exercising its discretion. Now sect. 50 of the Act of 1882 is one which throws great light on the scope of the Act. By that section, a tenant for life who has had conferred upon him the power of selling the property of which he is a tenant for life, is prevented from losing that power even in case of his bankruptcy. He can neither by assignment or release, whether the assignment is by operation of law or otherwise, deprive himself of the power of selling for the benefit of those whose interests he has to consider; he cannot contract himself out of the Act, and it follows that, even if the present tenant for life had no interest whatever in the matter himself, still he is clothed under the Act with the power of selling, provided he satisfies the Court that the sale is one which is within the contemplation of the Act of Parliament.

We come next to sect. 53, which is, to my mind, perhaps the most difficult and the most material section with which we have to deal to-day. It says, "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties." The inclination of my own view would be, with regard to that section, that it is an affirmative and not a negative section; that it is a section introduced for the protection of pecuniary interests in the first place; that it is a section which is not intended to make it a condition of the jurisdiction of the Court that the tenant for life shall have sat down at his table and have gone through any particular mental process about those who come after him, but that its object is to protect the material interests

and to prevent him doing anything in the exercise of his powers which will damage those interests. I should myself read the words, "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties," as meaning that he shall not so exercise the power as to disregard them or sacrifice them; and when the section says he is to "have regard to the interests of all parties," that is meant to impose upon him the duties which a Court of Equity will enforce against a trustee. But it may be said, and has been said, and the view apparently is entertained by some who are very competent to form an opinion upon this Act, that this would be, perhaps, a narrow view of the section, and that the section may go further, and include in its provisions that the tenant for life, as trustee, shall in a case in which it is proposed to include the mansion-House in a sale, and which therefore naturally involves some sentimental as well as pecuniary considerations, have regard to those sentimental considerations. The trustee's duty is, it is said, to consider sentiment as well as pecuniary interests; or, if not to consider all sentiment, at all events to consider that kind of sentiment and appreciation which a reasonable person may entertain of his own prospects of succeeding to residence in an old family house. If those interests are matters which a trustee is bound, under this section, to consider—and I assume for the purpose of the argument that it is so—to my mind it is impossible to construe this section in such a manner as to say that the existence of such a desire, the existence of such a hope, the existence of such a reasonable prospect of enjoyment in any one of the remaindermen, is to fetter the tenant for life, or to fetter the Court when the matter comes ultimately before it, so as to prevent altogether the action of the tenant for life in the sale unless he can get the concurrence of the remaindermen. It seems to me impossible to so hold, because otherwise no mansion-house ever could be sold if the Court found a single remainderman who had a reasonable prospect of, at some time or other, living there, provided he was rich enough to keep it up and to make it possible for him to live there with credit and advantage to himself. It would be practically impossible ever to sell the mansion-house in such a case; and I think, therefore,

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one must put some construction upon the section which will, at all events, enable the tenant for life, if he takes into consideration what I may call sentimental considerations, to override them should he think it necessary to do so. But, taking the view that I do, that this section does not intend to exhaust all the considerations which a tenant for life may well entertain, it seems to me that it is his duty, provided he has considered and safeguarded the interests of those who come after him in the settlement, to have regard to those obvious, and what I call natural considerations, which ought to animate any owner of property in dealing with it. He is bound, as a man of honour and as a man of conscience, to consider the people upon his estate; and if it is once seen that the remaindermen are protected in their interests, there is no reason under this section to prevent him from doing that which the other sections of the Act and the general scope of the Act seem to make it his duty to do, namely, to consider the general interest of the estate. In my view of the section I am satisfied that as soon as the tenant for life comes to this Court, the Court is not relegated to an inquiry into the mental process which he may have gone through before he comes to the Court. He comes to the Court to ask its consent to a sale. Is the Court to sit down and consider whether he is a person whose mental condition is such that the Court can trust him to form a fair judgment about large sums of money? If that be the view —if you are to inspect the thoughts of the tenant for life when he makes an application to the Court—then the greater rascal the tenant for life is, the more indissolubly he is tied to the estate, and the more impossible it is to sell the estate. What the Court has to consider, as it seems to me, is really the interests of those whose interests are entitled to be properly secured within the intention of the Act; and for that reason it seems to me that the argument of Mr. *Buckley*—that we must assume the tenant for life has in this case exercised no fair discretion under sect. 53—cannot prevail. I take it that the duty of the Court is, as soon as the tenant for life comes before it, unless, indeed, it be proved that there is any corruptness in the transaction, to examine for itself into the whole of the circumstances of the proposed sale.

Now, here the tenant for life has asked the Court for leave to

sell. Who are the persons the Court is to consider? In the first place, the tenant for life is to be considered. He is only to a limited extent interested in the failure or success of this petition. If the Court grants his request he will go a free man as regards his debts, though how long he will remain free one cannot tell. He has some pecuniary interest, I think, in the petition. I dare say that those behind him are really the persons who are putting him in motion. He has, however, some personal interest in coming to the Court. Sir *Horace Davey* told us with great force that we were to regard him with much suspicion, because it is his own fault that the estate has been brought into this position. I do not myself think that that consideration is one which can weigh with the Court when it deals with the petition because, as I said before on another branch of this case, if such were the law, the worse the landlord was the longer he would be inflicted upon the estate.

After the consideration of the tenant for life himself we come to what is a very important matter—the interests of the remaindermen. Their pecuniary interests are saved. But one cannot ignore the fact that this is a great blow and disappointment to the family.

Here is a mansion-house, not very old it is true, but one which, owing to its position on the estate, is, in spite of its comparative novelty, of great historical interest—one with which the honour of a great family is connected, and one which possesses an almost unique appendage to the mansion-house, namely, *Savernake Forest.* I do not wonder that Lord *Henry Bruce* feels bitterly that he and his family are likely to be divorced from so valuable an interest; but it must be recollected that Lord *Henry Bruce's* interest—I do not say that he has not sufficient interest to be considered—is more or less contingent. First of all, it is more or less contingent because the present Marquis may have children. He is a young man of twenty-eight years of age, and he may either have children by his present wife, or, in the natural order of things, he might marry again if she were to die. It is impossible, therefore, not to remember that many years may elapse before Lord *Henry Bruce's* interest comes into possession. It may not be Lord *Henry Bruce* himself, but the younger members of his

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family, who will ultimately come into possession; and in what condition will the house come into their possession if this judgment is to be upheld? *Savernake Forest* will have gone, supposing we reject this appeal, and the house itself may have become the home of the owls and rats long before Lord *Henry Bruce* or his family take it into their possession. The position of the remaindermen, therefore, is a peculiar one, and the considerations are mixed which apply to their cases.

But there is, upon the other hand, this to be considered—the honour of the family, of which I have no doubt Lord *Henry* in ordinary life is a thoroughly competent judge. One cannot but feel that although on the balance of considerations Lord *Henry* may think it is better for the family that this sale should be frustrated, he, of all men, will recognise the force of the observation that it is not for the benefit of a great family that ninety-five farms and 1000 cottages should remain, perhaps for a number of years, in the hands of money lenders and of an impoverished tenant for life. When the Court comes to consider the interests of the tenant for life and of remaindermen, it does appear to me to be a matter of public interest and a matter of duty to consider, also, very carefully, the interest of those upon the property, because the Act is intended to set free estates from embarrassment. I do not say that this Act of Parliament is an Incumbered Estates Act; but it has some features in common with such an Act. In my opinion, we must think twice and thrice before we consent to deprive these remaindermen of so unique a prospect as that which they would enjoy under the settlement; but I have not, any more than my learned brother has, the courage to say that this great tract of country, and this considerable number of persons, who are addicted to the soil, are to be neglected. There is no practical way of selling this estate for anything like the sum which will be obtained for it if the mansion-house is included. The evidence is as clear as possible upon that point. This is a unique sale. It can only be effected if the mansion-house and *Savernake Forest* are thrown in. The other alternative is this: a tract of land, partly down, partly arable, and partly pasture, will be sold piecemeal to anybody who will buy it, and the mansion-house and *Savernake Forest* will pass into the hands of

strangers for a limited period, namely, during the lifetime of the present Marquis, those strangers being his mortgagees, and persons who can have but very little interest in the place. Between the two alternatives it seems to me to be the duty of the Court to say that the public interests, in the sense of the interests of those who live upon the soil, ought to outweigh all the considerations of sentimental interest in the family, and that the honour of the family is best consulted by giving way to that view.

FRY, L.J.:—

In this case we are called upon to act under the 10th section of the *Settled Land Act* of 1890, which, for present purposes, is identical with the 15th section of the Act of 1882. That section requires, for the sale of the mansion-house and the lands usually occupied with it, two things, namely, the exercise of the power of sale by the tenant for life, and either the consent of the trustees of the settlement or an order of the Court. It is said in the present case that there is no valid exercise of the power of sale by the tenant for life, and that, therefore, there can be no order of the Court made which would give effect to the sale. That argument is based upon this—that the 53rd section of the Act of 1882 directs that the tenant for life shall, in the exercise of any power under the Act, have regard to the interests of all parties under the settlement. Mr. *Buckley*, in his forcible argument, has said that the circumstances shew that the tenant for life has not had regard to the interests of the other persons under this settlement, and that consequently there is no foundation whatever for the application to the Court. That is an argument which strikes at the root of the application; but, in my judgment, it cannot prevail. The 53rd section does not appear to me to impose a condition which affects the title or right to the exercise of the power of sale. It contains a direction to the tenant for life as to what he is to do in the exercise of his power, and it goes further, and in the latter part of it places him under the same liability as a trustee of the power if he wrongly exercises it. In my judgment, it is not necessary for a person who claims under a power of sale exercised by the tenant for life to shew that, in point of fact, the tenant for life did sit

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down and say to himself, "Such and such are the interests of the remaindermen, and I have considered them, and having considered them, I do so and so." In the present case, there is no reason, in my opinion, to come to the conclusion that the tenant for life did not regard the interests of the remaindermen. It is obvious that the conclusion at which he has arrived is consistent —absolutely consistent—with the consideration of those interests by a person of the highest intelligence and probity. Whether he is such a person or not it is not necessary to inquire.

The next observation which I desire to make with regard to the section in question is this—that there is no direction given as to what matters are to be considered by the trustees of the settlement in giving their consent, nor as to what matters are to be considered by the Court in considering whether it shall make the order or not. No doubt the trustee of the settlement must act honestly: he must act as an upright, independent, and righteous man would act in dealing with the affairs of others: and, in like manner, the Court is bound to inquire into every relevant consideration, every relevant circumstance; and, like my learned brethren, I decline to shut out from the consideration of the Court anything which ought to exercise an influence upon the discretion of an honest man. In the present case, therefore, I think we must approach the subject by a consideration of everything which should so influence an honest man or the Court.

Against making the order there are certainly very serious and weighty considerations. It is not a light thing to strip from an ancient, noble, and landed family the last acre of land which is attached to the title. It is not a light thing to disappoint what undoubtedly was the expectation of the head of the family when, in the year 1885, he consented to the sale of the *Yorkshire* mansion and the *Yorkshire* estates. Nor is it a light thing to overrule the wishes of those members of the family who, as things stand at present, are the next tenants in remainder. And further I will add, as a consideration which certainly would influence me, though not necessarily concluding the matter, that the tenant for life comes before us with no merits of his own.

Now, all those are considerations to which I attach great

weight in opposition to this sale; but giving them their full weight, they appear to me to be overbalanced by considerations in favour of the sale. One of the slightest of those considerations is the fact that the sale will undoubtedly enure to some extent to the pecuniary benefit of the tenant for life. For the reasons I have mentioned, I attach comparatively little weight to his pecuniary interest. I think he has so demeaned himself as to render it not necessary to attach any great weight to it. Then, again, I feel bound to observe this—that the tenant for life is a young man not yet thirty years of age; that it is impossible to forecast how long the life estate may remain in existence; that it is absolutely impossible to tell who may be the persons who will succeed him, for there may be, during his life, time enough for many changes, and it may be that no person now living will ever succeed as tenant for life; or it may be that he may shortly die, and that the persons now entitled may then come into possession. Therefore, it is impossible to forecast what will happen. This is not a case in which we have a tenant for life who is in old age, and a young successor, where we could with a reasonable chance of accuracy anticipate the events which are likely to happen. Nothing of the sort arises here; and though that does not, to my mind, exclude the consideration which we ought to give to the wishes of the tenants in remainder, it does affect the extent to which we ought to give effect to them.

Another consideration is this—that the statute has clothed the tenant for life with the power of selling the whole of the estate, except the mansion-house, or the demesne lands, or the lands usually occupied with it; and therefore it is quite conceivable that when the other members of the family come into possession of this property they may find nothing but the mansion-house and a part of the forest. They may find themselves in possession of a large mansion-house with no landed property around it: that is another consideration.

But the consideration which, in my mind, is dominant beyond all others, is that I cannot help regarding the alternative of refusing this sale as a frightful evil. It may well be, if we refuse this sale, that this property may remain for thirty, forty, or

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fifty years in the hands of the mortgagee or those who claim under him. No man will attach himself, in the way in which it is desirable a great landowner should attach himself, to a property of this description when he is only tenant *per autre vie*, and when his estate and interest in the property may thus, therefore, come to an end at any moment. We therefore must look forward to the estate being for a number of years—it may be for a long period or for a short one—occupied by those who will wish to make the most of it, who will have no regard or affection for it, or interest in it except as producing as much money as possible. We must look forward, therefore, to what may be a long period of physical and moral degradation. Now, such a result as that is not, in my opinion, for the good of the estate. It is plainly not good for the tenantry or the peasantry on the estate. In my judgment it is not for the interests, and certainly not for the true honour and dignity, of a noble family. That being so, it appears to me that we are bound to give effect to this application, and, notwithstanding the judgment of the learned Judge in the Court below, who, I think, has not given sufficient weight to the last consideration which weighs with me beyond all others, as we differ from him, we must allow this appeal.

LINDLEY, L.J.:—

The order of Mr. Justice *Stirling* will be discharged, and there will be an order affirming the contract with Lord *Iveagh* as embodied in the two contracts of the 23rd of June, 1891. The costs of all parties, both on the appeal and in the Court below, will come out of the estate. Each of the trustees has acted reasonably in taking different views of the case, and therefore he will be allowed a separate set of costs, as between solicitor and client. There will be liberty to apply in Chambers, if necessary, in case of any question arising, such as the form of the proposed conveyance and mortgage.

Solicitors: *Mewburn Walker & Lawrence; Hunters & Haynes; Nicholl, Manisty & Co.*

G. I. F. C.

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Lunacy—Alleged Lunatic—Inquiry into Mental Condition—Alleged Lunatic found of Sound Mind—Costs of Inquiry—Lunacy Act, 1890 (53 *Vict. c.* 5), *ss.* 90, 94, 98, 109.

A petition was presented by a husband for an inquiry into the mental condition of his wife, and, after a hearing lasting seventeen days, it was found by a majority of the jury that the wife was at the time of the inquisition of sound mind and capable of managing herself and her affairs.

The expenses of the inquiry were very heavy, and the Petitioner's costs were more than he was in a position to pay. His wife was entitled to large property, part of which was not comprised in the marriage settlement. The Petitioner applied to the Court to exercise its discretion under sect. 109 of the *Lunacy Act*, 1890, by directing that all the costs of the proceedings should be paid by his wife. The wife made a counter application that her costs should be paid by the Petitioner.

THE COURT (*Lindley*, *Bowen*, and *Kay*, L.JJ.) *held* upon the evidence that there were sufficient grounds to justify the Petitioner in instituting the inquiry; and that, under the circumstances of the case, the wife must pay her own costs, and the Petitioner ought to receive two-thirds of the amount of his costs of all the proceedings (to be taxed as between party and party) out of the property belonging to the wife, and not comprised in the marriage settlement.

Observations upon the principles to be applied by the Court when exercising the discretion as to costs conferred upon it by sect. 109 of the *Lunacy Act*, 1890.

THE question upon this application was by whom should be borne the costs of an inquiry into the mental condition of Mrs. *Cathcart*, which had resulted in a finding that she was of sound mind and capable of managing herself and her affairs.

Mrs. *Cathcart*, in 1887, was a Miss *Unwin*, an unmarried lady more than forty years of age, living with her mother, Mrs. *Unwin*. Her father was dead. She was possessed of considerable property, including a mansion and estate at *Wootton*, in *Staffordshire*, another estate at *Stourbridge*, in *Worcestershire*, and certain personal property. Her net income was stated to be about £4000 a year.

Mr. *Cathcart* was about twelve years younger than Miss *Unwin*. His means consisted of an annual allowance of £300, and a reversionary interest in certain lands in *Scotland*, expectant

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upon the death of his father. He applied for the position of agent to Miss *Unwin* at a salary of £200 a year. He afterwards proposed marriage to Miss *Unwin*. Her mother opposed it; and Mr. *Cathcart* wrote letters to Miss *Unwin*, dated the 13th of June, 1887, and the 17th of July, 1887, in which he expressed himself, as the Court considered, in unbecoming and apparently unjustifiable terms concerning her mother. On the 22nd of July, 1887, Miss *Unwin* and Mr. *Cathcart* were married. Miss *Unwin's* real and personal property were settled upon her by two deeds. One of these limited the real estate to the wife for life without power of anticipation, with remainder as to the *Staffordshire* property to her husband for life, determinable on bankruptcy or attempted alienation, with remainder to such children of the marriage as she should appoint by deed, and in default, to sons and daughters of the marriage successively in tail with an ultimate reversion to the wife in fee simple. The settlement contained powers for her to raise £2000 for repairs, and to appoint a rent charge of £200 to her husband for life, and also power to either tenant for life to sell the mansion at *Wootton*. The personal estate was settled, subject to a general power in the wife to appoint three-fourth parts of it, upon herself and the children of the marriage, giving no interest in any event to her husband.

The husband on his part secured to the wife a jointure of £500 a year if she survived him.

Shortly after the marriage, Mrs. *Cathcart*, without much reason, suspected her husband of infidelity; and on the 23rd of September, 1887, two months after the marriage, she left him of her own accord, and had not since cohabited with him.

Mr. *Cathcart* in his evidence stated that he had a great affection for his wife, and that until after she left him he had not the slightest idea that she was not perfectly *compos mentis*. He thought her mind was as sound as his own.

After leaving him she travelled about to various places, and consulted, amongst other doctors, Dr. *Dale* of *Scarborough*. Dr. *Dale* wrote to Mrs. *Cathcart's* uncle a letter, which was shewn to her husband, in which he stated that she was suffering from nervous excitement and hallucinations, and ought to be for six

months under medical care. On receipt of the bill of costs concerning her settlements, she had brought to her attention by it the interest which her husband took in the *Staffordshire* property and his power, if he survived, of selling the *Wootton* property. This greatly incensed her, and, after writing angry letters to the trustees of the settlements, she applied to two magistrates at *Skipton* for a conviction of these trustees for defrauding her about the settlements. The magistrates thought her insane, and one of them wrote to her friends suggesting that she should be put under control. This letter her husband also saw. In 1881 she had been engaged in a prosecution of some one who had written threatening letters, which prosecution failed. The Right Hon. Henry *Matthews*, Q.C., the present Home Secretary, had acted as counsel for the prosecution in those proceedings, and after leaving her husband she accused the Home Secretary, as her former counsel, of having neglected her interests, and of employing persons to poison her. She accused her mother also of this and other atrocious acts. She wrote to agents of the Liberal party making the accusations above mentioned against the Home Secretary. This correspondence was not, however, known to her husband till after he had presented his petition for an inquiry into her state of mind. Her husband saw her at an hotel and at lodgings in *London*, and endeavoured to induce her to put herself under medical care, which she refused. On the 13th of August, 1888, he wrote to her saying that the last thing he should wish would be to have her shut up in a lunatic asylum, and begging her to join him at *Wootton*. He prepared to receive her there by engaging a male attendant from a private asylum, to act as butler, and two nurses.

On the 15th of August, 1888, she wrote a letter to the gardener at *Wootton*, in which she alluded to alleged attempts to poison her. On the 22nd of August, 1888, she drove over to *Wootton*, and, finding that her husband was there, she drove away to *Ashbourne*, where she put up at an inn. Her husband, with a nurse and the lunatic attendant, followed her, and compelled her to get up at midnight and dress, and then took her to *Wootton*, where he induced her to sign orders in his favour (which, however, she countermanded) to her bankers and tenants to enable

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him to deal with her banking account and to receive her rents. Then he appeared to have left her at *Wootton*, and to have gone to *Scotland*, but leaving the attendant and nurses at the suggestion of the chief constable. It was remarked by Lord Justice *Kay* that this proceeding was not calculated to improve her condition or to mitigate her feelings towards her husband. She commenced a suit for divorce on the ground of adultery and cruelty, but abandoned the charge of adultery. She asked for judicial separation on the ground of cruelty. In this she was unsuccessful. Her husband took proceedings to secure a sum of £10,000 belonging to her, and not comprised in the marriage settlement, in which sum he claimed an interest under Scotch law.

On the 29th of May, 1890, Mr. *Cathcart's* solicitors wrote proposing that the settlements should be modified by arrangement, which, as Lord Justice *Kay* remarked, could only have been done if she were of sound mind. Mrs. *Cathcart* did not answer this letter. She lived at various hotels in *London*, often changing from one to another. She issued and distributed a large number of placards, in which she, in conspicuous type, complained that certain witnesses had been got out of the way. On the 16th of February, 1891, her husband gave her notice that an application would be made to commit her for doing this as a contempt of Court.

On the 24th of February, 1891, as Mrs. *Cathcart* was attending one of her cases in the High Court, a doctor, who had never before seen her, sat down by her and induced her to enter into conversation, and, after twenty minutes' talk, left her and made the necessary certificate to accompany an urgency order under sect. 11 of the *Lunacy Act*, 1890. Under this order she was seized as she came out of Court and conveyed to the *Priory*, a private asylum. There she was seen by several doctors, who considered her of unsound mind, judging from what had been told them and from their personal interviews with her.

Upon the petition of Mr. *Cathcart* the usual order was made for an inquiry into Mrs. *Cathcart's* state of mind. He made in the course of the lunacy proceedings a proposal in writing that if she were found lunatic she should be placed under

his care at *Wootton*, and that he should be allowed an income out of her property to make a home for her there, and also £2000 of her money for the repair and furnishing of the house. The inquiry took place before Master *Bulwer* and a special jury of seventeen persons, and, after a protracted hearing lasting seventeen days, thirteen of the jury, on the 23rd of July, 1891, found that she was of sound mind, and capable of managing herself and her affairs. The expenses of the inquiry were very heavy, and it appeared that the Petitioner was not in a position to pay his own costs of the proceedings, which were said to amount to upwards of £5000.

This was an application by the Petitioner (1.) that his costs of the petition for inquiry, and of and incidental to the inquisition, and of the present application, might be ordered to be paid by Mrs. *Cathcart*, the Respondent, and might be charged upon and paid out of her estate; and (2.) that all the costs of the Respondent of the matter of the alleged lunacy might be ordered to be charged upon and paid by the Respondent out of her estate.

There was a counter-application by the Respondent that all her costs as between solicitor and client should be paid by the Petitioner.

The other material facts sufficiently appear in the judgments of the Court.

Sir *H. James*, Q.C., *Inderwick*, Q.C., and *English Harrison*, for the Petitioner:—

The 109th section of the *Lunacy Act*, 1890, enacts that the costs of all proceedings "for the purpose of ascertaining whether a person is lunatic" shall be in the discretion of the Judge in Lunacy, and such Judge is expressly empowered to "order all or any of such costs to be paid by . . . the alleged lunatic, or to be charged upon and paid out of his estate, or such part thereof as the Judge thinks fit." The Legislature thus clearly contemplated that cases might arise in which it would be proper that an alleged lunatic should pay the costs of an inquiry in Lunacy which has resulted in establishing his sanity, and the Court will, in the exercise of its discretion, make the order if it is satisfied

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that the Petitioner had reasonable ground for supposing the alleged lunatic to be of unsound mind and incapable of managing herself or her affairs; and has acted *bonâ fide* in the proceedings. In this case the evidence shews that Mrs. *Cathcart* laboured under numerous extraordinary delusions, which affected her entire condition and mode of life, and that her conduct and delusions have been such as amply to justify an inquiry into her state of mind. The Petitioner had good ground for instituting these proceedings. He has acted *bonâ fide* throughout, and would be ruined if he had to pay the heavy costs which have been incurred during these justifiable proceedings. Mrs. *Cathcart* ought to pay her own costs; and the Court ought to exercise its discretion by allowing the Petitioner his costs out of his wife's property. There is a sum of £10,000 belonging to Mrs. *Cathcart* which might be made available for the payment of the Petitioner's costs. The Petitioner claims an interest in this sum under the Scotch law, but this interest he is willing to waive.

Sir *C. Russell*, Q.C., *Bucknill*, Q.C., and *Costelloe*, for Mrs. *Cathcart*:—

The Court, no doubt, has, under the 109th section of the Act of 1890, power to order costs to be paid out of the estate of a lunatic or alleged lunatic. But Mrs. *Cathcart* is not a lunatic, and she is no longer even an alleged lunatic, and it is at least doubtful whether the Court has now jurisdiction to make the order against her.

[KAY, L.J.:—The question is whether the person who commenced the proceedings had such sufficient cause for so doing as to induce us to order the costs to be paid out of the Respondent's estate.]

But, assuming the jurisdiction, this is not a case in which the power ought to be exercised, for the proceedings have been unreasonable, and, indeed, brutal. The greater part of the evidence produced by the Petitioner before the Master related to circumstances which were not within the knowledge of the Petitioner when he obtained the urgency order for his wife's arrest. It appears clearly from the evidence that the state of Mrs. *Cathcart's* mind was not such as to cause apprehension of

any danger to herself from suicide or to others by violence, and that there was no urgent present necessity for taking from her the control or management of her affairs. Her estates were in good order; and she had not made away with any portion of her property, but always held a tight grip of it. There was, indeed, some difficulty in getting money from her even for legitimate purposes. But that was a mere eccentricity, and if she had illusions, and was making mistaken charges, that was not part of her daily life. In order to entitle the Petitioner to call upon the Court to exercise in his favour the power given to it by the 109th section, it is not enough for him to shew that he had reasonable and probable cause for believing that his wife was eccentric and subject to delusions; he must shew that he had reasonable and probable cause for believing that she was, in the words of sect. 98, "of unsound mind and incapable of managing herself or her affairs." The delusions, to bring the case within the statute, must be such as to prevent her from taking care of herself or her affairs, or to be a cause of danger to herself or others. He has not shewn this. The delusions were, in great part, distortions and exaggerations which had a basis of fact; and, where there was no foundation for them, they were either statements suggested to and accepted by a credulous and suspicious mind, or mere rubbish; and she did not act upon them. On many occasions, moreover, the Petitioner treated his wife as a sane person, and dealt with her accordingly. In August, 1888, after he had forced her to leave the hotel at *Ashbourne* in the middle of the night, the first thing he did when they arrived at *Wootton* was to make her sign an order to her bankers to transfer her account into his name, and another order directing her tenants to pay their rent to him. Again, in May, 1890, he treated his wife as capable of bargaining with him for a reformation of the marriage settlements. She was finally seized, at his instance, under the urgency order in February, 1891, though he cannot allege that anything had supervened to shew that she was then less capable of managing her own affairs than she was in May, 1890, for in respect of the using of the placards about the disappearance of the witnesses he proceeded against her for contempt of Court as if she was a responsible person.

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The Petitioner has not acted *bonâ fide* in the conduct of the proceedings: *In re Windham* (1). There was nothing to justify the application for an urgency order under sect. 11. There never was any urgency, and the order was an abuse of the process of the Court. Such a proceeding should only be adopted where there is danger of homicide or suicide, or immediate risk to the health of the person against whom it is made. In the conduct of the Petitioner there are no traces of the kind and considerate conduct which a husband ought to adopt towards his wife. He has not succeeded in shewing that he acted without personal motives and solely with a view to the best interests of his wife. His real motive was to enrich himself and to obtain the position of master of *Wootton*. Lastly, he was not justified in commencing these proceedings unless he had reasonable grounds for believing that his wife was "of unsound mind and incapable of managing herself and her affairs." There is some ambiguity owing to the difference in the language of sects. 90 and 94, but, taking those sections in connection with sect. 98, it must clearly be "herself and her affairs." He has not shewn this; and the jury has found that she was capable of managing both herself and her affairs.

Sir *H. James*, in reply:—

By the 94th section of the *Lunacy Act*, 1890, the Judge, in ordering an inquisition before a jury, may direct an issue to be tried, "and the question in such issue shall be, whether the alleged lunatic is of unsound mind and incapable of managing himself or his affairs." It is true that sect. 90, in sub-sect. 1, empowers the Judge in Lunacy to "direct an inquisition whether a person is of unsound mind and incapable of managing himself and his affairs." But the combination of the two cannot be necessary. Although a person is shrewd in business matters, he may not be capable of taking proper care of his own person, or the converse may be the case; and upon the true construction of sects. 90, 94, and 98 it is enough that he should be either the one or the other, "incapable of managing either himself or his affairs." In either case a committee would be appointed;

(1) 4 D. F. & J. 53.

and if there was sufficient ground for supposing that Mrs. *Cathcart* was incapable of managing herself that would justify the commencement of proceedings. As to the urgency order, it was not requisite to shew danger to herself or others; it was sufficient to shew that it was for her welfare—*i.e.*, her benefit and better care. Mr. *Cathcart* wished to prevent her wandering about. The inquiry before the Master took place because Mrs. *Cathcart* insisted upon an inquiry before a jury, and refused to consent to an arrangement which might have made it unnecessary. A large portion of the costs would have been saved if terms which had been assented to by Mr. *Cathcart* and agreed to by her counsel, had been accepted by her, but she refused them.

In determining whether Mr. *Cathcart* was justified in his proceedings the Court ought to take into consideration the actual facts which existed, and were capable of being brought to his knowledge by reliable informants, and not such facts only as were within his personal knowledge at the time. Mr. *Cathcart* never wished to place his wife either in an asylum or under medical treatment, but simply that she should live in retirement. She would not, however, accept any control, but insisted on being at liberty to continue to make these charges of fraud, immorality, and crime against almost everybody with whom she came in contact. The object of the petition was a good one; the Petitioner took the best means of carrying it out, and ought not to be saddled with the costs of the inquiry.

1891. Dec. 16. LINDLEY, L.J.:—

The inquiry which has taken place in this case has resulted in a verdict that Mrs. *Cathcart* was at the time of inquisition of sound mind and capable of managing herself and her affairs.

The question now arises, by whom are the costs of the inquiry to be borne? Mrs. *Cathcart* asks the Court to order the Petitioner to pay them. He asks that she may be ordered to pay them. It is quite possible that neither side may be entitled to be paid costs by the other. The Court has to decide what is right in the matter.

At first sight it may appear strange that a person found to be of sound mind should pay the costs of an unsuccessful attempt

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to prove him otherwise. But a little consideration will shew that circumstances may exist under which such a result may be reasonable and just.

An inquiry into a person's state of mind is not like an ordinary litigation, and whilst, on the one hand, to obtain and prosecute such an inquiry is to inflict a grievous wrong, if there is no justification for it; yet, on the other hand, it may not only be justifiable but right to institute and prosecute such an inquiry, even although the result should be to establish the sanity of the person whose state of mind has been investigated. This view has long been acted upon by the tribunals of this country, and is sanctioned by the Legislature. Sect. 109 of the *Lunacy Act* of 1890, provides that:—"The costs of all proceedings for the purpose of ascertaining whether a person is lunatic, and of all proceedings in the matter of a lunatic shall be in the discretion of the Judge in Lunacy, who may order all or any of such costs to be paid by the lunatic or alleged lunatic, or to be charged upon and paid out of his estate, or such part thereof as the Judge thinks fit, or by any other party to the proceedings; and in the case of the death of the lunatic or alleged lunatic, an order for payment of costs out of his estate may be made within six years next after the right to recover the costs has accrued, and every such order shall have the effect of an order of the High Court."

It is obvious from the words "alleged lunatic" in this section that the Legislature sanctions the view that there may be circumstances under which the Court, in the exercise of its discretion, may make any one of the three orders to which I have alluded—may make an order upon the person found sane to pay the costs of the inquiry resulting favourably to himself. The matter being thus left to the discretion of the Court, I do not think it right to attempt to lay down any principles or rules by which the free exercise of its discretion may be fettered. I will content myself with enumerating and making a few observations on those matters which occur to me as essential for consideration.

The points to be considered are: (1.) The reasons for believing in the insanity of the alleged lunatic; (2.) The reasons for believing him to be not only insane, but also incapable of managing

himself or his affairs; (3.) The reasons for instituting any proceedings, assuming him to be insane and incapable of managing himself or his affairs; (4.) The relation in which the Petitioner stands to the alleged lunatic, and the objects and conduct of the Petitioner; (5.) The respective means of the parties and the amount of the costs. These matters must always be important; but, in addition to them, there may be others, and, if there are, they also must be taken into account by the Court before coming to a conclusion as to what ought to be done.

Upon the foregoing matters I proceed to make a few observations.

(1.) It is obvious that no proceedings in lunacy can be justifiably taken against any one who is not reasonably supposed to be of unsound mind. A person may be unfit to manage himself or his affairs from various causes other than unsoundness of mind—*e.g.*, various forms of illness, bodily injuries, old age, &c. But, however unfit, unless insanity can be discovered proceedings by inquisition ought not to be had recourse to.

(2.) If insanity is believed to exist, still proceedings by inquisition ought not to be had recourse to unless the supposed lunatic has shewn himself to be incapable of managing himself and his affairs. I regard this as a distinct head of inquiry. The line which separates sane from insane persons is very difficult to draw; and, although in most cases of inquiry it may be easy enough to say to which class the alleged lunatic belongs, in some cases it is very difficult. Unless a person's insanity is so marked and of such a nature that he is not able to manage himself and his affairs, he ought not to be found lunatic; and, unless there is considerable evidence of his inability, no inquiry ought to be set on foot. "Inability to manage either himself or his affairs," is inability to manage both. Sects. 94 and 98 of the Act remove any ambiguity in the use of the word "and" instead of "or" in sect. 90 in the phrase "managing himself and his affairs." Whether a scientific expert would say that no person can be of unsound mind and still be capable of managing himself or his affairs, I do not know; but the Legislature has proceeded upon the assumption that a person may possibly be of unsound mind and may yet be capable of managing himself and his affairs.

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Hence the importance of attending to this matter in addition to the first.

(3.) Assuming that there are grounds for supposing a person to be insane, and to be incapable of managing himself or his affairs, it does not follow that there is any occasion to institute proceedings by inquisition against him. It is necessary to consider his position, and what management is wanted in his particular case, and whether his friends and relatives are bestowing such care and management as are required. A person who is insane, but who is living at home and is carefully and judiciously looked after, may well be left alone; whilst an insane person in a different position, even if harmless to himself and others, may require protection which can only be afforded through the medium of an inquiry. A very difficult question arises, especially in the early stages of insanity, when medical supervision and treatment will probably lead to recovery, and when its absence may result in permanent illness. What ought to be done in such a case, if the patient cannot be brought to see the necessity for, and will not submit to, temporary supervision and enforced quiet and removal from all those excitements and surroundings which aggravate his illness? In such a case—a very common one—it cannot be said that an inquiry is necessarily improper; it may be essential if the progress of the disease is to be stopped. In considering the reasonableness of taking hostile legal proceedings against an alleged lunatic, it is very material to ascertain whether he could or could not be brought to realize his own position and to submit himself to the care of others.

(4.) The relation in which the Petitioner stands to the alleged lunatic and the Petitioner's objects and conduct are the last matters to which I will refer. It is plain that these matters, although not relevant to the inquiry into the state of mind of the alleged lunatic, are very important in considering the question of costs. An unsuccessful inquiry promoted by a stranger for purposes of his own, perhaps mainly in the hope of getting costs, ought to be regarded very differently from an unsuccessful inquiry promoted, perhaps most reluctantly, by a husband or wife or some kind relative or intimate friend acting *bonâ fide* in the interest of the alleged lunatic and for the protection of him-

self and his property. Between these extremes there is room for many differences of degree; but it would be hopeless for the promoter of an inquiry which resulted in a verdict of sanity to ask the Court to order his costs to be paid by the alleged lunatic, unless the Court came to the conclusion that there were reasonable grounds for the inquiry; that the inquiry was really desirable; that the Petitioner was under the circumstances a proper person to ask for it; and that he acted *bonâ fide* in the interest of the alleged lunatic (see *In re E. S.* (1), where costs were not given, and *In re C.* (2), where they were given; and see *In re Windham* (3), where this matter is much discussed). If, however, the Court is satisfied on all these points the Court ought, I think, to give the Petitioner his costs, unless there is some reason why he should not have them, or at any rate the whole of them, which is quite conceivable.

(5.) The respective means of the parties and the amount of the costs cannot, in my opinion, be disregarded. If the Petitioner could well afford to pay the costs, and the alleged lunatic would be ruined if ordered to pay them, the Court would not, I apprehend, order him to pay them, whilst there might be no such reluctance if the reverse were the case. The Court ought to endeavour to do what is fair and just in each particular case. Even the amount of costs is not immaterial. Moreover, in considering these matters regard must be paid not only to the expenses incurred, but to the necessity for them, which will very often depend on the course taken by the Petitioner or by the alleged lunatic. Either party may by his conduct render an inquiry much more expensive than it might otherwise have been.

Having made these observations on the points which have to be considered in all cases of the kind now before the Court, I proceed to state shortly the conclusions at which I have arrived in this particular case.

As to Mrs. *Cathcart's* unsoundness of mind, accepting as I do the verdict of the jury that she was of sound mind at the time of the inquiry, it is, in my opinion, proved as clearly as any question

(1) 4 Ch. D. 301 (2) Law Rep. 10 Ch. 75.
(3) 4 D. F. & J. 53.

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of this sort can be proved that her mind was at one time disordered; that she suffered from delusions which can only be characterized as insane; and that under these delusions she did many things which no sane person would have done. I do not refer to her mistaken views of her right to impeach her settlement, nor to her jealousy of her husband, for her views on these matters may be explained on the ground of inferences from imperfect knowledge. But her views about her mother, about the danger of being poisoned, and about the Home Secretary and the Conservative party were such as only an insane person would entertain.

As to her ability to manage herself and her affairs and the reasons for instituting an inquiry, the evidence shews no suicidal or homicidal tendency, but suspicion at one time of being poisoned, which if unchecked might have led her to refuse food. The mode in which she conducted herself in connection with her litigation with her trustees and her husband was that of an insane rather than that of a sane person. Her case was plainly one which urgently required medical treatment and supervision and care, but she could not be brought to see it, and would not submit to it. There was no one to look after her property, and her rents were considerably in arrear. Moreover, she was exposed to the baneful influence of one person at least who was aware of and did not scruple to aggravate her suspicions and fears for his own purposes. Further than this, she was leading an unsettled, restless life, which, to say the least, was extremely detrimental to her. Under these circumstances, I am of opinion that there were ample grounds for instituting an inquiry into the state of her mind with a view to place her, not necessarily in an asylum, but under proper care and supervision.

There remain for consideration the relation of the Petitioner to her, and his conduct. The Petitioner was her husband, the person of all others whose duty it was to treat her with tenderness and affectionate kindness, to endeavour to induce her to submit herself to be treated for a serious illness, and to protect her from its development and permanent loss of health if she could not or would not take the necessary steps to prevent it. Unfortunately the marriage was not a happy one. Mrs. *Cathcart* would not live

with her husband, nor would she be guided by him. He is accused of having married her for her money, and of having taken proceedings in lunacy against her with a view to his own interests, and to drive her to terms with respect to her money rather than to protect her. Whether he married her for her money I do not know. Anyhow, he married her, and improved his position from one point of view. I gather from the evidence that he got some money from her, but not in any reprehensible manner. He soon, however, found that his wife was a most difficult person to get on with; and great allowance must be made for the real embarrassment in which he was placed. At the same time some part of his conduct to his wife certainly required explanation—I mean his forcible removal of her from the inn at *Ashbourne* in August, 1888, and his having recourse to an urgency order, and placing her in an asylum in February, 1891. I have considered these matters and the rest of his conduct to her with the greatest care, and I have borne in mind that he did not know of the correspondence with the agents of the Liberal party when he presented his petition for inquiry.

I am satisfied that in August, 1888, Mrs. *Cathcart's* state of mind and conduct were such that her husband, as a reasonable man, could not have left her alone. The letter of Mr. *Ingham*, after the hearing of her case at the *Skipton* Quarter Sessions, and the other information which Mr. *Cathcart* then had, placed him in a position of great embarrassment. What could he do better than try and induce her, and by reasonable means make her submit to proper treatment? He certainly did not want to place her in an asylum when he took her from the inn at *Ashbourne*. He wanted to avoid that, if possible. I am satisfied that the violence used in taking her to *Wootton* was greatly exaggerated, and that the best thing she could have done in 1888 would have been to have gone there as invited, and allowed herself to be placed under the care of a medical attendant and nurse. I think it highly probable that the mode in which she was removed from the inn at *Ashbourne* did in the result aggravate her illness by increasing her fear of being again arrested. But then it must be remembered that she would not submit to be treated as ill and requiring care. Looking back with the light of what has

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occurred since, it would perhaps have been better if an inquiry had been asked for then; but I am not prepared to blame Mr. *Cathcart* for not having taken that course at that time.

Then, as regards the urgency order, if Mrs. *Cathcart* could have been induced to see competent medical advisers, and to be guided by them, I should have thought the urgency order wholly unjustifiable; but she would not. The urgency order has, however, I think, added to the distress of Mrs. *Cathcart*, and by exciting great hostility it has probably caused extra expense. At the same time I am satisfied that Mrs. *Cathcart's* husband took these proceedings *bonâ fide* in the interests of his wife, most reluctantly, at the urgent request of her own mother, and acting on the advice of his solicitor, a man whose ability and integrity are well known. Moreover, when at *Roehampton*, Mrs. *Cathcart* herself insisted on an inquiry before a jury, and refused her consent to an arrangement which might have made it unnecessary. The expense of the inquiry has, however, been enormous, and the Petitioner's costs, even when reduced by a proper taxation, will amount to a very large sum, and much more than he is in a position to pay. The inquiry took seventeen days, and counsel of the highest eminence were retained on both sides. I do not know to what extent the costs actually incurred by the Petitioner might have been reduced; but I see no sign of any attempt to keep down expense. The Taxing Master will, of course, disallow all the costs incurred by the Petitioner, except those which have been necessarily incurred by him.

The conclusion at which I have arrived in this very painful and difficult case is, that the Petitioner is entitled to be paid by Mrs. *Cathcart* a considerable part of his costs of the petition and of the inquiry, and his costs of this application. In order, however, to protect her from all extravagant and improper charges, those costs ought to be taxed as between party and party, and not as between solicitor and client, nor upon the principle adopted in the Chancery Division when costs come out of an estate. This is a case in which the Taxing Master ought to be vigilant in attending to the distinction. The result will no doubt be to throw on Mr. *Cathcart* some part of the costs which he has incurred, but this will, in my opinion, be just as between

him and his wife. One order ought to be made on both of the applications which are before us. Mrs. *Cathcart's* application will be dismissed with costs. There must be an order to tax, as between party and party, Mr. *Cathcart's* costs of his petition, and of the inquiry, and of this application, and two-thirds of the amount of those costs when taxed must be paid out of the capital sum of £10,000, in which Mr. *Cathcart* claims to have some interest, but which claim he has waived so far as necessary for the payment of these costs, and each party is to have liberty to apply to one of the Lords Justices, if necessary.

BOWEN, L.J.:—

There have in my experience been few cases which have come before the Court which have presented so much difficulty, or on which all of us together, and each of us separately have felt it our duty to spend more anxious and prolonged thought. The usual, and indeed the imperative, rule where abortive proceedings are taken in an action is that a successful defendant cannot be ordered to pay the unsuccessful plaintiff's general costs. The discretion of the Court under the Judicature Acts may indeed be exercised in such a case to deprive a successful defendant of his costs, but the Court has no jurisdiction to order him to pay the general costs of the action. That law has been clearly and emphatically laid down in this Court, and has been applied to litigious proceedings before other tribunals. But the subject-matter of the section with which we have to deal differs in an important degree from that of ordinary litigious proceedings. The Court, beyond all question, has a discretion conferred upon it by statute to give an unsuccessful petitioner who has asked for an inquiry against an alleged lunatic the costs out of the property of the alleged lunatic himself. It is a discretion which must be exercised in each case with reference to the entire circumstances of the case; and where an Act of Parliament confers upon the Court discretion to deal with each case as it arises before it, no judge and no Court can impose rules upon that discretion, or lay down canons by which it shall be exercised. We have, however, to remember in dealing with this discretion, that the object of the applicant must be to obtain

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payment out of a fund, and that he must have had from the beginning of the proceedings the prospect, or the hope, that his costs would come out of the fund. I think we all have had a melancholy experience in the difficulty of dealing with such cases, and the great danger—when suitors before us have in view the possibility of the payment of their costs coming out of a fund—that the expenditure will be more lavish and more inconsiderate than if there was only a more limited hope of getting payment from an ordinary antagonist.

We begin, in this case, by accepting the verdict of the jury. I have no desire to go behind it, and I accept it fully. That leaves still untouched the considerations which must be most potent in considering how we should exercise our discretion. I have come to the conclusion, like Lord Justice *Lindley*, that there was in this case, for the reasons which he has given at length, and which I will not repeat, ample ground for instituting these proceedings against Mrs. *Cathcart*.

The next point to which one naturally directs attention is whether the Petitioner was acting *bonâ fide* throughout, considering the advice which he received, and considering the position of the lady. Again abstaining, as I will for the sake of brevity, from repeating the grounds, with which I entirely concur, which have been expounded by the Lord Justice, I also am of opinion that the true conclusion upon those facts is that the Petitioner was acting *bonâ fide* in instituting the proceedings against his wife. But that does not conclude the duty of the Court. We have still to consider the entire conduct of the Petitioner and the entire circumstances of the case, because it may well be that want of judgment, or want of consideration on the part of the Petitioner may have been such as to deprive him of the right to expect that this Court will allow the whole of the costs to come out of the property of the alleged lunatic. Two matters, and two matters of great importance, have been brought to our notice. The first is the urgency order under which the lady was arrested and carried to the custody of the lunatic asylum. I had at first very great doubt as to whether that urgency order could be justified, but I must say that the speech of Sir *Henry James* convinced me that it was impossible in this

case to deny that the urgency order was a reasonable one. As I said before, the Petitioner was acting throughout on the advice of his solicitor, a gentleman of high character and experience in the profession. On the other hand, his wife at the moment was under great and grievous delusions which might have resulted in serious injury to her own health. She was living an excited and wandering life, and above all she was acting in concert and under the direct influence of a most unscrupulous scoundrel who did not hesitate by every means in his power to foment her delusions, to encourage her excitement, and to increase her suspicions against her husband. It seems to me that, melancholy as the position was, one cannot deal with the husband upon the footing that he was acting wrongly in arresting her under the urgency order.

With regard to his previous conduct in respect of his wife, I entertain not so clear a view. I am still unsatisfied, with regard to the *Ashbourne* proceedings in 1888, that there was any possible justification for his taking his wife at the dead of night out of the room at the hotel where she found temporary refuge, and I cannot but feel that his behaviour in that respect throws a light upon the position which was being created and has since been developed between himself and this unfortunate lady. I think he did place himself in a position of hostility to her, which was calculated to some extent to exaggerate her fears of himself, and to encourage the strong antipathy which she has manifested to him in the years which have subsequently elapsed.

I have come to the conclusion that the husband, although he has been acting *bonâ fide* in this petition and in the proceedings about it, has unconsciously, by a certain harshness or certain want of judgment, placed himself in a hostile position to the lady. I think, therefore, the true measure of relief which is to be granted to him in respect of his costs is to give him only such costs as a hostile person could recover against those with whom he is waging litigation. And indeed that is not the entire measure of the diminution which should be made in respect of these costs. They have been enormous; we know they have been enormous. I have seen, like the Lord Justice, that there has been no real attempt to keep down expense, and I think that

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the nearest approach that we can make to justice in the matter, an approach which I am satisfied can only be an imperfect one with all our endeavours, is to say that the lady shall pay her own costs, and that the husband shall have two-thirds of the taxed costs as between party and party. It seems to me that to give him more would be dangerous, to give him less would be unjust. That, therefore, is the conclusion to which I have come, in common with the Lord Justice who has preceded me in delivering his judgment, and I can only hope that it is an approximation to justice, though it cannot be said to be an absolute or accurate ascertainment of the figure.

KAY, L.J.:—

This case is so difficult and important that I think it right to express my reasons for concurring in this judgment.

An inquiry has taken place before a Master in Lunacy and a jury as to the state of mind of Mrs. *Cathcart*. The jury have found that she was of sound mind at the date to which the inquiry relates. The costs of this proceeding have been, we are told, very heavy. Mrs. *Cathcart* now asks that her husband should be ordered to pay them. He insists they should be paid by her. A third alternative would be to leave each party to pay their own.

The Court has jurisdiction to deal with the costs in any of these ways.

In considering what course shall be taken the Court is at liberty and, in my opinion, is bound to regard all the circumstances of the case.

[His Lordship then read sect. 109 of the *Lunacy Act*, 1890, and after stating the facts of the case to the effect above set forth, continued:—]

In a case like this, where personal liberty was in question, the verdict of a jury ought to be accepted without hesitation. And it seems to me that it would be wrong in every way to deal with the present application upon any theory except that this verdict was right, and that this lady was not of unsound mind at the time to which this inquiry relates.

But that by no means concludes the question we have now to

determine. No doubt it is a very strong measure to direct that all the costs of such an inquiry should be paid out of the estate of a person proved to be sane. It may, however, be done, and the section of the statute which I have quoted in terms contemplates this by empowering the Court to direct payment out of the estate of "the lunatic or alleged lunatic," which last words must mean although he may be found to be sane.

It may be said in this case that the eccentric conduct of Mrs. *Cathcart* and the delusions under which she laboured were such as to give ample reason for an inquiry as to her state of mind. I think that was so, and if her husband, after exhausting all other means of inducing her to submit to proper care, had petitioned for such an inquiry no one could have blamed him, and he might have made a strong case for costs, even though such an inquiry had resulted in finding her sane. But then, if such measures had been carefully and considerately taken, and a position of personal hostility avoided, the inquiry might have been conducted in a comparatively friendly manner and at comparatively trifling expense. Here, on the contrary, the husband has treated his wife, by the seizure at *Ashbourne* and by the urgency order, in a mode which was sure to intensify the feelings under which she was labouring, and to drive her to regard him as her chief enemy; and the consequence has been this most lamentable and costly struggle before a Master in Lunacy for seventeen days; and I cannot help condemning strongly this mode of treating a wife. If they were equal in point of fortune, I should be clearly of opinion that the utmost relief he could be entitled to would be not to be made to pay her costs. *Primâ facie* having failed, he ought to bear all the costs. It cannot be said that a futile inquiry such as this could be for her benefit in any way.

Then what difference should the great inequality of their means make in our decision? I am of opinion that it is a matter which must be considered. The payment of these costs, it is suggested, may be made out of the £10,000 in which the husband claims some interest, and his counsel is willing that this should be done, even if his claim be valid. He will give up any interest—if he has any—so far as is necessary to satisfy

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these costs. His costs of the inquiry are said to be from £5500 to £6000. If her costs bear any proportion to his, there will not be enough to pay both. On the other hand, the payment of £6000 would almost ruin the husband, and this consideration adds greatly to the difficulty of coming to a decision.

Weighing all the facts of the case, my inclination is not to give him any costs out of her property. If any are given, I think they should only be given out of the capital of the £10,000, and that the amount so allowed to the husband should be further limited to a sum not exceeding two-thirds of the amount of his taxed costs, as between party and party, of the inquiry and of this application. This would be ample to cover the costs of an ordinary inquiry, such as I think might have taken place in this case if the husband had acted with due consideration for his wife.

I anticipate that the nominal costs of the husband will be greatly reduced on taxation.

Costelloe:—Do your Lordships intend that the £10,000 is to be the only fund to be made liable for the Petitioner's costs?

LINDLEY, L.J.:—It is the only fund we have mentioned in our order. The statute says that the costs may be paid "out of his estate." The costs are to come out of that fund. Mrs. *Cathcart* is, as to a good deal of her property, restrained from anticipation. We purposely ordered the payment out of that fund in order to prevent any embarrassment with reference to the property as to which she was restrained from anticipation.

Solicitors for Petitioner: *Crawley, Arnold & Co.*
Solicitors for Respondent: *Lumley & Lumley.*

W. W. K.

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Jan. 15, 26.

[1891 C. 4406.]

Libel injurious to Trade—Placard—Circular—Injunction—Jurisdiction.

The Court has power to restrain by injunction on interlocutory motion the publication of placards and circulars containing statements injurious to trade where the Court is satisfied upon the facts and evidence before it that such statements are false.

The decision in *Bonnard* v. *Perryman* (1) discussed.

MOTION.

This was a motion on behalf of the Plaintiffs for an interim injunction to restrain the Defendant *Marshall*, the secretary of the *Amalgamated French Polishers' Trade Unions Permanent Committee*, and the Defendant *Stuart*, a printer, from publishing or circulating any notice, placard, circular, &c., to the effect that a strike of workmen has occurred or is pending in connection with the trade or business of pianoforte-makers carried on by the Plaintiffs, or that the business of the Plaintiffs was carried on improperly or inefficiently, or from otherwise directly or indirectly making or circulating any other statement or allegation calculated to injure the Plaintiffs in their said trade or business.

On the 24th of September, 1891, the Plaintiffs received a letter from the Defendant *Marshall*, acting as secretary of the above-mentioned committee, as follows:—

"Sir,—I am instructed by the above to request you to reduce the number of boys in your employment to an average of not more than one boy to every two men; also to ask you to abolish the contract system, your firm being the only respectable one in which that pernicious system prevails. Failing to accede to our request, we shall call all your men out of your shops on Monday, September 28."

From the evidence it appeared that on receipt of this letter

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Mr. *Cecil Collard*, a member of the Plaintiffs' firm, called the french-polishers at the *Oval Road* works together, and informed them of the letter. He asked them whether they were dissatisfied with their employers. Some of those who were paid off on the same day stated that they were not dissatisfied with Mr. *Osborn*, the Plaintiffs' polishing contractor, personally, but that they were determined to stand by the committee in their endeavour to put down the contract system and the employment of a number of boys out of proportion to the men. In the afternoon of the same day Mr. *Collard* called the polishers together again, and stated that he regretted the decision that some of them had come to, and told them that if they left the firm would never employ them again. On that day some fifteen men elected to leave, and were paid off, and some few more left, and were paid off the following day. The total number who left or were discharged was about eighteen. The french-polishers who elected to remain, to the number of some sixty or upwards, many of whom had been in the employment of the firm for several years, expressed themselves as entirely contented with the conditions of the employment, and since then none of the polishers who remained had left or been discharged. The Plaintiffs immediately afterwards drafted some of their experienced french-polishers from their *Grosvenor Road* works to the *Oval Road* works, and at once commenced to fill up the vacancies, the whole of which were filled up within a week or ten days after the 24th of September. The polishing work continued as if no discharges had been made, and the Plaintiffs suffered no inconvenience in consequence thereof.

Shortly after the 24th of September men acting under the orders of the Defendant *Marshall* paraded the streets in the neighbourhood of the Plaintiffs' *Oval Road* works, and their show-rooms and offices in *Grosvenor Road*, and elsewhere, bearing a placard having on it the following words:—

"To french-polishers. A strike is now on at *Collard & Collard's* against cheap labour and the sweating system of contract work."

And shortly before the commencement of the action in November, a printed circular was sent to a number of dealers in

musical instruments, a large proportion of whom were the Plaintiffs' customers, which was as follows:—

"*The Amalgamated French Polishers' Trade Unions Permanent Committee.*

"Sir,—I am instructed by the above to write you the true facts *re* the strike at *Collard & Collard's* against the sweating system of contract work and the excessive employment of boy labour to the exclusion of the skilled workman.

"A short time ago we issued a circular requesting the piano-forte-makers to restrict their number of boys to an average of not more than one to each two men. *Collard's* was the only firm which did not comply with our request.

"We now ask your co-operation to assist us to put an end to this pernicious system of sweating at *Collard & Collard's*, which is hurtful alike to the dealer, the public, and the worker.

"Hoping this will meet with your favourable consideration, and that you will help us by insisting on your polishing being properly done,

"I am, Sir, yours respectfully,

"*W. Marshall*, Secretary."

With regard to their french-polishers and other workmen, it appeared that the Plaintiffs adopted the following system. The whole of the work was done on the premises of the firm, and in order to secure more efficient work they did not employ a foreman or overseer in the ordinary sense, or engage the workmen themselves, but they arranged with a competent person to carry on the work and engage the general body of the workmen, who, though nominally the servants of the contractor, were regarded by the firm and treated by them as directly in their own employ, and they made it a stipulation with the contractor that not less than union wages should be paid to the men, which in the case of the french-polishers amounted at least to 8*d.* an hour, but some received more and the boys less. No complaint was made as to the wages, and the average length of service of most of the men employed was at least ten years. The Plaintiffs supplied this contractor, who himself worked as a polisher in the same way as the other men, with money from time to time to pay the

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wages; they also fixed the rate of wages; and it was wholly out of the power of the contractor to curtail for his own advantage the wages of the workmen. The contractor superintended the whole of the polishing department, and their present contractor, *Osborn*, had been so employed by the Plaintiffs for about ten years, and had never earned for himself more than from £150 to £200 a year.

The Plaintiffs, considering that the placard and circular contained untrue statements calculated to injure their trade, commenced this action, and now moved for an injunction in the terms of the above notice of motion.

Byrne, Q.C., and *P. B. Abraham*, in support of the motion:—

The circular and the placard constitute a trade libel which the Court has jurisdiction to restrain by means of an interlocutory injunction, and we ask an injunction to restrain the issue of those or of any similar circular or placard: *Liverpool Household Stores Association* v. *Smith* (1); *Bonnard* v. *Perryman* (2); *Thorley's Cattle Food Company* v. *Massam* (3); *Hill* v. *Hart-Davies* (4); *Hermann Loog* v. *Bean* (5). A remedy by damages would in this case be useless and inadequate.

There is no evidence in support of the allegations that the french-polishing is badly done or of the other injurious insinuations. The Defendants do not swear that they intend to justify at the trial.

If a jury were to find in favour of the Defendants on the facts as they now stand, the verdict would be set aside as against the weight of evidence. The Defendants are holding up the Plaintiffs' business to public odium; and unless the Court can in circumstances such as these grant an injunction tradesmen and manufacturers may be ruined with impunity.

Fischer, Q.C., and *C. E. E. Jenkins*, for the Defendants:—

This is simply a trade dispute between employers and the employed. The statements complained of are in substance true.

(1) 37 Ch. D. 170.
(2) [1891] 2 Ch. 269.
(3) 14 Ch. D. 763.
(4) 21 Ch. D. 798.
(5) 26 Ch. D. 306.

The question whether that was not so, and whether they were libellous, was one for a jury, and on the evidence as it stood at present it could not be said with confidence that no jury could be found to give a verdict in favour of the Defendants. That is the test which the Court must apply when called upon to exercise its jurisdiction to restrain a libel by injunction: *Bonnard* v. *Perryman* (1).

Byrne, in reply.

CHITTY, J.:—

The injunction asked for at the Bar is less extensive than that sought by the notice of motion. It is confined to the placard and the circular, or any similar placard or circular. It is admitted by the Defendant *Marshall* that the placard is being paraded in the neighbourhood of the Plaintiffs' works by his immediate instructions, and that the circular is signed by him. A point raised on his behalf by his counsel may be disposed of at once. It was said that he was merely acting as secretary to the committee of certain trade unions, and therefore that no injunction ought to go against him. But it is clear that if the Plaintiffs have in other respects made out their case, the circumstance that he is acting under the orders of others is no defence: he is not on that account less responsible for his own wrongful acts.

The Defendants by their counsel offered to treat the motion as the trial. This offer was declined by the Plaintiffs' counsel on the ground that the names of the persons under whose directions the Defendants have been acting are unknown to them, and that they are desirous of adding those persons as Defendants. The names were asked for on the motion, but not disclosed.

The Defendants have entered into evidence generally in support of their defence. They do not suggest that they will be in a position to improve their defence by further evidence or by cross-examining the Plaintiffs. I have, therefore, apparently the whole of their defence before me. On these points, then,

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their case differs from *Bonnard* v. *Perryman* (1), where the defendant reserved his defence to the trial. He filed a short affidavit to the effect that the article complained of as a libel was true, and that he would be able to prove the same by witnesses and the cross-examination of the plaintiffs at the trial. He desired a trial by jury; but the Defendants here asked that the action should be disposed of by a Judge.

[His Lordship having read the placard and circular, proceeded:—]

The complaint against the placard is directed first to the statement that "a strike is now on" at the Plaintiffs' works; and secondly, to the allegation that the strike is against the sweating system of contract work. Against the circular the like complaints are made, and a further complaint is made as to the allegation or suggestion that the polishing is not being properly done.

[His Lordship having then carefully gone through the facts and the evidence generally, held that the statement that "a strike is now on at *Collard & Collard's*," the allegations as to the sweating system, and the statement in the circular as to the polishing were all untrue in substance and in fact. With regard to the "sweating system" His Lordship in the course of his judgment made the following remarks:—]

There may be, as the Select Committee of the House of Lords seems to have found, a difficulty in framing a precise and exhaustive definition of the term "sweating system." It is obviously a figurative expression. It involves a system oppressive to the workman, whereby an unconscionable or unjust profit is wrung from the sweat of his brow by paying him insufficient wages for his work. There is generally a middleman taking advantage of the circumstances in which the workman is placed, and grinding down for his own profit the wages of those employed below the fair rate. But, however the term may be defined or explained, it cannot fairly or reasonably be applied to the system adopted by the Plaintiffs. The workmen receive wages not less than the rate fixed by the amalgamated trade unions, and this standard cannot be objected to as unfair or unjust.

(1) [1891] 2 Ch. 269.

The circumstance that the Plaintiffs employ more lads or boys than the union thinks right, does not justify the Defendants calling the Plaintiffs' system "the sweating system," or "the pernicious system of sweating." Where the system prevails, the epithet "pernicious" is not at all too strong. [His Lordship, after commenting on other parts of the evidence, proceeded:—]

It is unquestionable that the statements complained of are calculated to inflict serious injury on the Plaintiffs in their trade. The most serious are those relating to the sweating system. They are calculated to bring the Plaintiffs and their business into hatred and contempt, and to deter respectable persons from dealing with them. Being untrue, they are cruel. The imputation is odious.

There is no question as to the Defendants intending to continue to publish the placard, or as to the Defendant *Marshall* intending to continue to publish the circular.

One word as to the law and practice of granting injunctions in cases of this sort on an interlocutory application. The Court of Chancery, before the *Judicature Act*, had power to intervene by injunction to protect property, but not to protect character; it had no power to try a libel. Since the *Judicature Acts*, the Chancery Division has on motion granted injunctions restraining the further publication of false statements calculated to injure a man's trade. Such an injunction was granted by Sir *G. Jessel*, M.R., in *Thomas* v. *Williams* (1). The Court always acts with the greatest caution, and is keenly alive to the difficulty, which varies greatly with the circumstances of each case, in framing an injunction which will protect the plaintiff without unduly restricting the right of free speech. In *Bonnard* v. *Perryman* (2), the Court of Appeal had before it the case of a libel affecting the plaintiff's general character, and a libel of the kind which could not be satisfactorily disposed of upon affidavit, and which was peculiarly fit to be submitted to the decision of a jury. The Court did not purport to overrule any previous decisions as to trade libels. I can find nothing in the judgment which precludes my acting on the opinion I have formed of the facts in this case, or my granting an injunction in a carefully

(1) 14 Ch. D. 864, 867. (2) [1891] 2 Ch. 269.

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limited form. If the rule adopted by the Court of Appeal—namely, that the jurisdiction ought to be exercised on interlocutory motion only in the clearest cases, where, if a jury did not find the matter to be libellous, the Court would set aside the verdict as unreasonable—was intended to apply to the case of a false statement directly affecting the plaintiff's trade, I think that, consistently with that rule, I am justified in granting an injunction in the special circumstances of this case.

The injunction will be to restrain the Defendants, their servants and agents, until judgment or further order, from further publishing or causing to be published the placard or any other placard to the effect that a strike is now on at the Plaintiffs' works or that the sweating system is there practised, and to restrain the Defendant *Marshall*, his servants and agents, from further publishing or causing to be published the circular or any other circular to the effect that the sweating system is practised at the Plaintiffs' works, or that the polishing is badly done at the Plaintiffs' works.

If the Defendants should think fit to publish statements to the effect that there was in September, 1891, a strike against the system of contract labour or the employment of an undue proportion of boys at the Plaintiffs' works, the injunction I grant will not prevent their doing so.

Solicitors: *Mason, Phillips, & Cotton; Shaen, Roscoe, Massey & Co.*

G. M.

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In re TWIGG'S ESTATE.
TWIGG *v.* BLACK.

[1891 T. 1924.]

Will—Partial Intestacy—Distribution of Intestate's Estate—Provision for Widow—Intestates' Estates Act, 1890 (53 & 54 *Vict. c.* 29)—"*Testamentary Expenses*" *in sect.* 6.

The *Intestates' Estates Act,* 1890, does not, like the *Statute of Distributions* (22 & 23 Car. 2, c. 10), apply to cases of partial intestacy.

The phrase "testamentary expenses" in sect. 6 is a slip in the drafting of the Act, and means expenses of letters of administration and of administration generally.

ADJOURNED SUMMONS.

Charles Twigg, by his will dated the 5th of December, 1871, after reciting that his wife, *Anne Twigg,* was amply provided for by settlement, made certain specific bequests of leaseholds for the benefit of his wife's daughter, Mrs. *Black,* and her children, and gave the residue of his real and personal estate to trustees, upon trust for sale conversion and investment, and to pay the income to his sister *Eliza* for life, and after her decease in trust, as to both capital and income, for such of his brothers and sister (naming them) as should be alive at his (the testator's) death, and if more than one as tenants in common.

The testator died on the 22nd of November, 1890, without issue, leaving his widow, *Anne Twigg,* surviving.

All the testator's brothers and sisters, including *Eliza,* the tenant for life, predeceased him.

The gross value of the testator's estate was sworn under £5088; the net value was considerably over £500. There was no real estate.

Anne Twigg, the widow, died in March, 1891, and letters of administration to her estate were granted in June following to *Anne Black,* who now claimed, as legal personal representative of the widow, to be entitled, under the *Intestates' Estates Act,* 1890, to £500, in addition to her share in the estate of *Charles Twigg* as his widow, under the *Statute of Distributions,* on the ground that the testator, *Charles Twigg,* died intestate as to his residuary estate. The legal personal representative of the

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testator now applied by summons to have this question determined.

Creed, for the summons:—

The whole scheme of the *Intestates' Estates Act*, 1890, shews that it was intended to apply only to cases of total intestacy; the words "die intestate" must mean dying without a will; therefore, it does not apply to cases of partial intestacy such as this, and the representative of the widow is not entitled to a preferential £500.

E. Beaumont, for the legal personal representative of the widow:—

The *Intestates' Estates Act* is only an amendment of the old *Statute of Distributions* (22 & 23 Car. 2, c. 10). The phrase in sect. 1 of the Act of 1890, "who shall die intestate," is practically the same as "any person dying intestate" in sect. 3 of the *Statute of Distributions*, and there, as was said by Lord *Eldon* in *Twisden* v. *Twisden* (1), "it" *i.e.*, intestate, "means, not a person making no will, but a person dying intestate as to the subject to be distributed by the statute." The *Statute of Distributions* has always been applied to cases of partial intestacy, and I submit that the new Act should be, and was intended to be, applied in the same way: the widow, therefore, in this case became entitled, under sects. 2 and 4, to an additional £500. Besides, sect. 6 speaks of "testamentary" expenses, which is an inappropriate expression if the Act is to be limited to total intestacy. [He also referred to the definition of "Intestate" in 2 *Stephen's* Commentaries (2).]

Creed, in reply:—

The Act of 1890 only meant to deal with small estates and small intestacies; the title of the Act is to make better provision for the widows of "certain intestates."

CHITTY, J. (after briefly stating the facts, continued):—

The question for my decision turns upon the true construction of the recent Act, the *Intestates' Estates Act*, 1890, which is stated

(1) 9 Ves. 413, 425. (2) 9th Ed. p. 183.

to be "An Act to amend the law by making better provision for the widows of certain intestates in the distribution of such intestates' property," and a contest has now been raised whether this Act is to apply to cases of partial intestacy in the same way as it applies to cases where a man dies wholly intestate.

Sect. 1 enacts, that "the real and personal estates of every man who shall die intestate" after a certain date, leaving a widow and no issue, shall, "in all cases where the net value of such real and personal estates" shall not exceed £500, belong to his widow absolutely. It is to be observed that the wording of this section is not "the real and personal estates as to which any man shall die intestate," but "the real and personal estates of every man who shall die intestate"—language which taken in its ordinary meaning applies to the whole of a man's real and personal estates; and then the section goes on to deal with the net value of "such real and personal estates," which, in the event of its being under £500, are to go to his widow absolutely. The 2nd section again refers to "the net value of the real and personal estates in the preceding section mentioned," out of which, in the event of their exceeding £500, the widow is to have a charge for that amount upon "the whole of such real and personal estates"—an expression which points to the application of the Act to the whole of the intestate's real and personal estates. The 3rd section shews how the charge is to be borne as between the realty and personalty, and the 4th section gives the widow this £500 in addition to her share in the residuary estate. The Act does not impair a man's testamentary power, and it would be inconsistent with its language to hold that the charge in favour of the widow extends to those parts of his estate of which he dies testate. I pass over the 5th section, which relates only to the mode in which the value of the real estate is to be calculated; and then I come to the 6th section, which runs, "the net value of such personal estate as aforesaid shall be ascertained by deducting from the gross value thereof all debts, general and testamentary expenses of the intestate, and all other lawful liabilities and charges to which the said personal estate shall be subject." That section appears to me to be conclusive: it speaks of the "net value of such personal estate as aforesaid"—that means

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of the whole personal estate—and you are to ascertain this net value by deducting from the whole personal estate the debts and other liabilities in the usual way. If the Act were intended to apply, as has been argued, to that part of an estate as to which a person had died intestate—*e.g.*, a share of residue which lapsed—the effect of sect. 6 would be to throw the whole of the debts, general and testamentary expenses, upon the lapsed share the portion out of which it is contended that the widow is to take her £500—a result directly opposed to the universal practice in the administration of estates. This seems to me to be conclusive that the Act was only intended to apply to the case of a man dying wholly intestate. A point was made by Mr. *Beaumont* of the use of the word "testamentary expenses"; the expression, of course, is not strictly applicable to an intestacy; but, taking the Act as a whole, I think I am justified in reading it as a slip in draftmanship, and as meaning the expenses of obtaining letters of administration and of administration generally.

The object of the Legislature in passing this Act was, in my opinion, not to deal with the case of, say, a millionaire who made a will providing for his widow, and, through some unforeseen circumstances, died intestate as to a portion of his residuary estate; the Act never intended that the widow in such a case as that should take a clear £500 in addition to her distributive share. What the Legislature intended was to make better provision for the widow where there was a total intestacy. True it is that the *Statute of Distributions* (22 & 23 Car. 2, c. 10) speaks of persons "dying intestate," and that this statute has been and is applied to cases of partial intestacy; but, reading the Act of 1890 as a whole, I think the Legislature meant what it said, and that the Act applies only to cases of total intestacy. The result, therefore, is that the widow in this case, or her legal personal representative, as she is now dead, is not entitled to receive any more under this partial intestacy than she was entitled to under the old *Statutes of Distribution.*

Solicitors: *Guscotte, Wadham, & Daw,* agents for *Sparkes & Pope, Exeter* and *Crediton; Fladgates.*

W. C. D.

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Feb. 3.

Company—Winding-up—Practice—Appointment of Liquidator—Official Receiver—Determination of Creditors and Contributories—Result of Meetings—"May"—Discretion of the Court—Unanimous—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 6, *sub-s.* 1, 3—*Companies (Winding-up) Rules,* 1890, *r.* 63.

Under sect. 6, sub-sect. 1 (*a*), of the *Companies (Winding-up) Act,* 1890, the right of the majority of the creditors and contributories present at the statutory meetings, to have their nominee appointed liquidator, in the place of the Official Receiver, is subject to the control of the Court, and the Court, in the exercise of its discretion, may refuse to appoint such nominee, or any liquidator, and can leave the winding-up in the hands of the Official Receiver.

The "unanimous" determination of the creditors and contributories, mentioned in rule 63, sub-rule 2, of *Companies (Winding-up) Rules,* 1890, refers to the unanimity of all the creditors and contributories at the meetings, and not to unanimity in the result of the two meetings.

ADJOURNED SUMMONS.

This was an application in the winding-up of the *Johannisberg Land and Gold Trust Company, Limited,* raising the question as to the right of creditors and contributories to have an official liquidator appointed other than the Official Receiver.

The company was a small one, which very shortly after its incorporation was ordered to be wound up compulsorily, on the petition of a creditor and contributory, whereupon, under sect. 4 of the *Companies (Winding-up) Act,* 1890, the Official Receiver became provisional liquidator.

On the 21st of July, 1891, meetings of creditors and contributories were duly held, pursuant to sect. 6, with the result, that at each meeting the following resolution was passed by a proper majority: "That *A. C. Harper,* chartered accountant, be appointed liquidator in the place of the Official Receiver, and that no committee of inspection be appointed. That the Court be applied to to sanction the appointment." Eight contributories, holding twenty-eight shares, voted in the majority. The minority consisted of nine contributories, holding ten shares. Three

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creditors for £99 7*s.* 10*d.* voted in the majority at the creditors' meeting, and two creditors for £59 12*s.* 10*d.* were in the minority.

On the 5th of August, 1891, the Official Receiver reported the result of the meetings to the Court, and added: "The assets of the company have been realized by the Official Receiver, and are available for immediate distribution, the amount realized is sufficient to pay costs and expenses and the debts of the unsecured creditors in full, and to leave a sum of £400 for distribution amongst contributories The fees payable to the Official Receiver as per scale are £50, and must be paid whether he is appointed liquidator or not; and that, therefore, the appointment of *A. C. Harper* as liquidator is, in the opinion of the Official Receiver, an unnecessary expense, and should not be sanctioned by the Court."

The Official Receiver, on the 8th of August, took out a summons to consider the determination of the meetings, the report of the Official Receiver, and a summons was taken out on behalf of the majority at the two meetings, asking for the appointment of *Harper*. These summonses were both adjourned into Court, and came on together. The Official Receiver was not represented by counsel, but had informed the Court that he did not wish to prevent any question from being argued. No formal objection was taken by the Court or by the minority as to the mode in which the question was raised.

During the argument it appeared that all the creditors had been paid in full.

Whinney (Sir *H. Davey*, Q.C., with him), for the contributories who claimed the appointment of a liquidator:—

The Official Receiver's duty is simply to report the result of the statutory meetings. Form 32, at the end of the *Winding-up Rules*, 1890, shews that he has gone outside his duties by adding what he has in this case. As to any additional expense, that is provided against by rules 154, sub-rule 2, and 155. The *Companies (Winding-up) Act*, 1890, sect. 4, refers to the Official Receiver as "provisional liquidator" only, and under sect. 6, sub-sect. 1 (*a*), the meetings are to determine whether application

shall be made to the Court to appoint a liquidator "in the place of" the Official Receiver. "In the place of" means "other than." It is clear the Act contemplated the appointment of a liquidator other than the Official Receiver; then sect. 6 goes on: The Court "may" make any appointment required to give effect to the "determination of the meetings"; the word "may" gives the Court a power to appoint, but not a discretion, except in the case of a difference between the determinations of the meetings. The creditors and contributories are to be the persons to decide whether the winding-up shall be official or non-official. Then, again, in rule 63, sub-rule 2, upon the report of the result of the meetings, the word "may" again only confers a power, if the creditors and contributories are "unanimous" in their determination. "Unanimous" here must mean identical in result; because under sect. 6, sub-sect. 1 (*a*), the Court is to give effect to the determination of the meetings, not to the determination of individual creditors; the wording of sect. 6, sub-sect. 1 (*a*), must govern the interpretation of rule 63, sub-rule 2, which is based upon it. Under the circumstances of this case, I say the Court has no discretion, but should appoint *Harper* liquidator; in any case, it ought to appoint some outside liquidator other than the Official Receiver. These meetings, as a rule, are never unanimous in the literal sense, and to refuse this application is tantamount to deciding that the Official Receiver can come to the Court and say, "Notwithstanding the wishes of the majority of the creditors and contributories, I say there is no need for a liquidator." This was never intended.

Farwell, Q.C., and *Macnaghten*, for the contributories who were in the minority at the meeting:—

The word "may," both in sect. 6, sub-sect. 1 (*a*), and in rule 63, sub-rule 2, means to confer a discretion on the Court: *In re Baker* (1); it was never intended that the Court, in such a case as this, should simply register the result of the meetings. "Unanimous" has been used designedly and means what it says.

We oppose the appointment of any liquidator, and desire that the winding-up should be completed by the Official Receiver.

(1) 44 Ch. D. 262.

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The creditors have been paid, and there is nothing more to do, except to divide the surplus assets between the contributories.

Whinney, in reply.

CHITTY, J.:—

The first question is as to the force of the word "may" in the 6th section of the Act. The sentence runs thus: "The Court may make any appointment and order required to give effect to any such determination," and so on. Now it is contended by Mr. *Whinney* that the word "may" there means "must." This argument is really disposed of by the judgment of the Court of Appeal in *In re Baker* (1). For all substantial purposes, the nature of the enactment in that case, and in this case, is identical. To my mind it would be an absurdity to suppose that the Legislature intended that the Court should merely register the determination of the meetings. I am satisfied that the intention of the Legislature was to give the Court a discretion as to making the appointment and order. In the 4th section there is a similar expression. The 5th sub-section is, "The Official Receiver may be appointed by the Court provisional liquidator of the company at any time after the presentation of the petition and before a winding-up order has been made." It would be absurd to suggest that "may" in that section means "must." I think, therefore, that the word "may" here confers a discretion on the Court, to be exercised, as all judicial discretions are to be exercised, according to the judicial rule; and consequently that the Court in the present case has a discretion whether it will accept or not the person who has obtained the majority of votes at the meeting of contributories and of creditors. If the Court, in the exercise of its discretion, declines to appoint this gentleman or some other person liquidator, then the 3rd sub-section of the 6th section takes effect. That sub-section says, that in case a liquidator is not appointed by the Court, the Official Receiver shall be the liquidator of the company, and that sub-section itself is an additional argument for the conclusion at which I have arrived, that the words "may

(1) 44 Ch. D. 262.

make any appointment," and so forth, in the earlier part of the section, confer a discretion only, because the third sub-section contemplates the case of a liquidator not being appointed. It becomes, therefore, scarcely necessary to deal with Mr. *Whinney's* argument founded upon sect. 6, sub-sect. 1 (*a*), which was, that meetings were to be held for determining whether or not application is to be made to the Court for appointing a liquidator in the place of the Official Receiver. Mr. *Whinney's* argument was that the words "in the place of," must be read as "other than." In my opinion there is no ground for that argument. It is an alteration of the language of the Legislature, from which alteration certain consequences are intended to be deduced as to the true meaning of the whole section. That being so, I consider I have a discretion.

Then there was a point raised on the rules, namely the 63rd rule, sub-rule 2, which runs thus: "Upon the result of the meetings of creditors and contributories being reported to the Court, the Court may, if the creditors and contributories are unanimous in their determination, upon the application of the Official Receiver, forthwith make the appointments necessary for giving effect to such determination. In any other case the Court shall, on application by the Official Receiver, fix a day for considering the determinations of the meetings, deciding differences (if any), and making such appointments and orders as shall be necessary." Upon that it was argued by Mr. *Whinney* that the term "unanimous" was to be read in this way—if there was no difference between the resolution of the creditors at their meeting, and the resolution of the contributories at their meeting, and unanimity, which he says was all that was required by this rule, was the unanimity of result, however narrow might be the majority by which the resolution was carried. In my opinion that argument cannot be maintained. I must again give credit to the language of the rule as the rule stands; and I think that "unanimous" there means unanimous. It means that the creditors at their meeting, and the contributories at their meeting, are all of one opinion, and of one mind. It would be a strange thing if having the language of the section to which this rule is addressed particularly before them, those who framed

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the rules had not used the phraseology of the Act which speaks of a difference between the determinations of the meetings of the creditors and contributories; Mr. *Whinney* very properly observed, that if he had been drawing the rule, that is to say drawing it in the sense of his construction, he should not have used the words "if the creditors and contributories are unanimous in their determination," but would have taken the language of the Act and said, if there is no difference between the determinations of the meetings. I think the observation would be right, if that had been the meaning of the framers of the rules; but it is quite plain, not only from that part of the rule itself upon which I have just been commenting, that that is not the meaning. It is evident that was not intended to be the meaning by what follows, because it says, "In any other case"—that is, in any case, other than that in which the creditors and contributories are unanimous in their determination, the Court is to fix a day for considering the determinations of the meetings—now come the important words, "deciding differences if any." The construction which Mr. *Whinney* put upon this rule was one that would have resulted in there being nothing to decide unless there were differences, and this part of the rule contemplates that there may be no difference between the determinations of the two meetings.

Then I go back to the substance of the matter. In my opinion, both the Legislature, and those who framed the Rules, intended to leave a discretionary power in the Court to be exercised in a proper manner, where the resolutions at the two meetings are carried by majorities, but there are still some dissentients; I have had such a case in Chambers myself, where for certain reasons which I thought sufficient, I declined to accept the opinion of the majority. In that case, the facts of which I can state substantially, there were a few creditors who voted for a particular gentleman as liquidator; but a very large number of creditors voted for the Official Receiver; but inasmuch as their debts did not overtop the amount of the small number of persons voting against them, their resolution was not carried at the meeting; and with regard to the contributories there was an infinitesimally small number of contributories voting for the same gentleman,

and there was an overwhelming majority so far as regards contributories voting against; but by reason of those who were largely in the minority in point of numbers holding vendors' shares, and shares of that description, the resolution, according to the Act of Parliament, was carried by the vote of a very small number, and the difference was remarkable in that case, because I got an opportunity of looking into the matter and found that there was ground for having a public examination and a public official to take the superintendence of the winding-up.

For these reasons, as I have said, I am of opinion that I have a discretion in this particular case; and now I come to the exercise of it. The majority at the creditors' meeting was one. There were three for Mr. *Harper* and two against him; and the debts of the three over-balanced the debts of the two. At the contributories' meeting, there were not many persons present. There were apparently, counting proxies, eight for Mr. *Harper* and nine against him. I mention these facts merely to shew that there was no preponderating vote at either meeting in favour of Mr. *Harper*. Perhaps I ought to say here, as Mr. *Harper's* name has been mentioned, that there is nothing suggested against Mr. *Harper*, personally, in the case. There are no personal reasons why he should not be appointed liquidator. Now, the Official Receiver reports to me that the assets have been realized by him and are available for immediate distribution, "and that the amount realized is sufficient to pay the costs and expenses, and debts to unsecured creditors, and £400 for distribution amongst the contributories." And it is added by a gentleman from the Receiver's office, and that is not questioned by Mr. *Whinney*, "that since this report was made all the creditors have been paid 20*s.* in the pound." There is, therefore, about £400—not a large sum, to distribute amongst the contributories, and the Receiver says that the fees payable to him as per scale are estimated at £50; and he says that they must be paid to him whether he is continued liquidator or not. I consider, under these circumstances, seeing how little remains to be done, seeing what the apparently small amount of the fund is, and having regard to the additional expense that will be occasioned by my appointing Mr. *Harper*, that I ought

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to exercise my discretion by not appointing him, and by not appointing any liquidator. That being so, the 3rd sub-section of the 6th section of the Act takes effect, and the Official Receiver stands, in virtue of that Act, as liquidator.

Solicitors: *Irvine, Hodges, & Borrowman; Dollman & Pritchard.*

W. C. D.

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In re SMOKELESS POWDER COMPANY'S TRADE-MARK.

Trade-mark—Rectification of Register—Distinctive Label—Distinctive Words—Common to the Trade—Addition to Trade-mark—Part of Label—Disclaimer—Name of Owner of Mark—Calculated to Deceive—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64, 73, 74—*Patents, Designs, and Trade Marks Act,* 1888 (51 & 52 *Vict. c.* 50), *s.* 10, *sub-s.* 3 (*i*).

The company had registered, under the *Patents, Designs, and Trade Marks Act,* 1883, as their trade-mark, a label consisting of a target on which were two concentric circles, the inner containing certain words, black spots, and letters, and between the inner and the outer circle the words "*Smokeless Powder Company, Limited*;" the target was supported on one side by a sportsman, and on the other by a soldier in uniform. On an application by a rival company to remove this mark from the register, unless a disclaimer of the words "*Smokeless Powder*" was entered:—

Held, that the words were not "distinctive words," and that no disclaimer was required; and further, that the words being contained in a distinctive label registered as a whole, under the Act of 1883, need not be disclaimed under sect. 74, inasmuch as they formed a part of the label, and were not additions to it: *In re Hudson's Trade-marks* (1) explained on this point; *In re Apollinaris Company's Trade-marks* (2) and *Pinto* v. *Badman* (3) discussed and applied:—

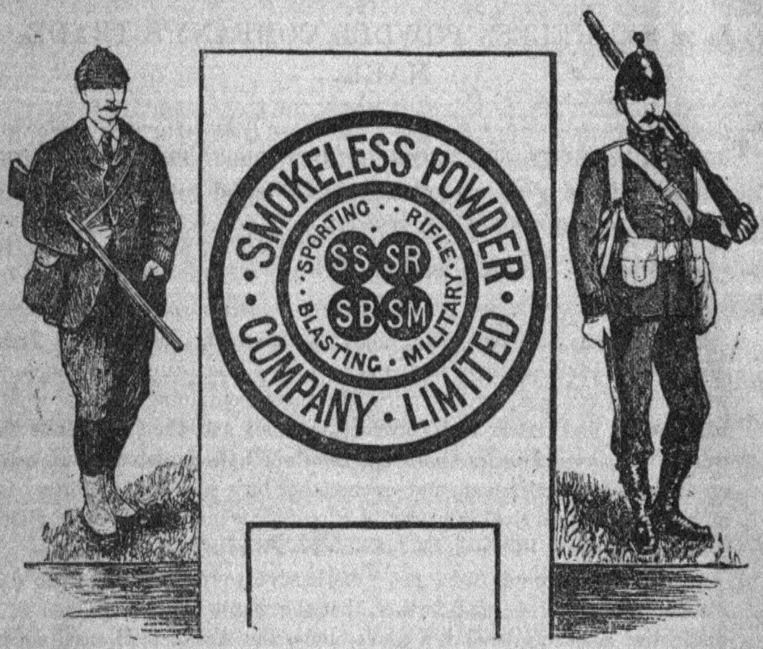
Held, also, that the words complained of were not "calculated to deceive" within sect. 73; and that, even if they had been additions to the label, they would have been protected from disclaimer, as part of the name of the owner of the trade-mark.

MOTION on behalf of the *Schultze Gunpowder Company, Limited*, to rectify the register of trade-marks by removing there-

(1) 32 Ch. D. 311. (2) [1891] 2 Ch. 186.
(3) 8 Rep. Pat. Cas. 181.

from the subjoined trade-mark No. 74341, which had been registered in March, 1888, by the *Smokeless Powder Company, Limited.*

There was evidence on behalf of the Applicants that "*Smokeless Powder*" was a well-known trade term, descriptive of "*Schultze,*" "*E.C.*" and other powders of that class which produce only a very slight amount of smoke as compared with the ordinary black gunpowder. The manager of the Respondent company, however, deposed that his company did not claim, and never had



claimed, that the registration of the label or trade-mark No. 74341 conferred any exclusive right to use the words "*Smokeless Powder,*" or that the company now had any such right by virtue or by reason of such registration.

Aston, Q.C., and *Wurtzburg*, for the motion :—

We are clearly "aggrieved" by this trade-mark, which, as it stands, in effect claims a monopoly of the words "*Smokeless Powder.*" These words are common to the trade, and descriptive of the particular article made; therefore, when they were registered, these words ought to have been disclaimed under sect. 74,

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sub-sect. 2, of the Act of 1883. In *In re Hudson's Trade-marks* (1), a somewhat similar case, *Cotton*, L.J., expressed a very decided opinion on sect. 74, sub-sect. 2, that the words "*Soap Powder*," being common to the trade, could only be registered with a disclaimer. This trade-mark, therefore, should be removed, unless the Respondents will undertake to enter a disclaimer. Then, again, the exclusive use of these words, which this mark claims, is calculated to deceive (sect. 73), and therefore they are not entitled to protection. This mark is calculated to deceive the public by making them believe that smokeless powder is only made by the Respondent company.

Sebastian (*Moulton*, Q.C., with him), for the Respondent:—

The Applicants are not persons aggrieved. Descriptive words like these cannot give a monopoly, and we do not and cannot claim any right to the words "*Smokeless Powder*" by virtue of the registration. The expression of the Court of Appeal in *In re Hudson's Trade-marks* as to the interpretation of sect. 74, sub-sect. 2, is only a *dictum*, because *Hudson's* marks were registered under the 1875 Act, as was also the case in *In re Atkins' Trade-mark* (2). As to who is a "person aggrieved," that is very clearly laid down in *In re Apollinaris Company's Trade-marks* (3).

[CHITTY, J.:—The point really is whether you ought not to have disclaimed pursuant to sect. 74, sub-sect. 2, of the 1883 Act.]

The words complained of are part of our label, not an addition to it. By sect. 64, sub-sect. 1 (*c*), a distinctive label is an essential particular of a trade-mark, and is, in fact, a trade-mark; under sect. 64, sub-sect. 2, "there may be added a combination of words" such as in this mark, and these, with the device, form the whole label. These words, then, are not additional matter within sect. 74, sub-sect. 2, and, therefore, not the proper subject for a disclaimer. The same point was raised and decided in *In re Apollinaris Company's Trade-marks* (4), and in *Pinto* v. *Badman* (5).

(1) 32 Ch. D. 311.
(2) 3 Rep. Pat. Cas. 164.
(3) [1891] 2 Ch. 224.
(4) Ibid. 219, 233.
(5) 8 Rep. Pat. Cas. 188, 191.

Then, again, the words complained of are not "distinctive words," or a distinctive combination of words: *Burland* v. *Broxburn Oil Company* (1); they are only part of the name of the company, which, under sects. 64 and 74, as now amended by the Act of 1888, need not be disclaimed. Neither is there anything in the mark calculated to deceive within sect. 73; it is not inherently deceptive, like the word "*Patent*"; nor does it resemble any one else's marks.

On these grounds the motion should be refused.

Aston, in reply.

CHITTY, J.:—

The complaint of the Applicants against this trade-mark is, that it contains the words "*Smokeless Powder*," running round the inner circle of this disc; and they say that the registration of this trade-mark having been made under the Act of 1883, it was incumbent upon the Respondents to disclaim the term "*Smokeless Powder*."

It is observable that these words form part of the Respondent company's name. Now, what is the meaning of the name in itself? It does not assert any monopoly of the right to make smokeless powder, but it is merely an indication to the public that the Respondent company manufactures and sells smokeless powder.

The questions of law argued turn on the 64th and 74th sections of the *Patents, Designs, and Trade Marks Act*, 1883. Sect. 64 is divided into two parts—I omit the proviso in sub-sect. 3, as it does not affect the present case. Sub-sect. 1 lays down the essential particulars of which a trade-mark must consist, or which a trade-mark must contain; and sub-sect. 2 enacts, "There may be added to any one or more of these particulars any letters, words, or figures, or combination of letters, words, or figures, or of any of them." Then turning to sect. 74, under which it is argued for the Applicants that the disclaimer ought to have been made, I find in sub-sect. 1, "Nothing in this Act shall be construed to prevent the Comptroller entering on the

(1) 42 Ch. D. 274.

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register . . . as an addition to any trade-mark" (I pass on to sub-clause (*b*), the one applicable to this case) "any distinctive word, or combination of words, though the same is common to the trade in the goods with respect to which the application is made"; and then comes sub-sect. 2, that "the applicant for entry of any such common particular or particulars must, however, disclaim in his application any right to the exclusive use of the same, and a copy of the disclaimer shall be entered on the register." That, therefore, which is to be disclaimed, according to the Act, is a distinctive word, or combination of words, although it is common to the trade. Now, in my opinion, the words "*Smokeless Powder*" are not distinctive words, or a distinctive combination of words—they are two ordinary English words denoting that no smoke, or practically no smoke, comes from this powder. That being so, it follows that no disclaimer is required under sect. 74.

It was argued that *Cotton*, L.J., in *In re Hudson's Trade-marks* (1), had expressed his opinion on sect. 74 of the Act of 1883, and had suggested that in a case similar to the present, a disclaimer was requisite. In that case, the Court had before it a mark where the registration was directed, or made, under the Act of 1875; and, therefore, all that fell from the Lord Justice in regard to the Act of 1883 must be taken to be merely a *dictum*—though certainly it was his opinion—that, in regard to the term "*Carbolic Acid Soap Powder*," if the case had come under the Act of 1883, it would have been incumbent upon the person seeking registration to have disclaimed those words. In the result the trade-mark was allowed to stand, although the Court in its order expressed an opinion that there was no exclusive right to the words "*Carbolic Acid Soap Powder*." *In re Hudson's Trade-marks* was cited in *In re Apollinaris Company's Trade-marks* (2), where one of the marks under discussion was No. 45096, and in dealing with that mark, Lord Justice *Fry*, in delivering the judgment of the Court, refers (3) to *Hudson's Trade-marks*, where, he says, the point, or a similar point, might have been raised. The objection—so far as material to the case

(1) 32 Ch. D. 311. (2) [1891] 2 Ch. 186.
(3) [1891] 2 Ch. 233.

before the Court—that had been raised to the mark No. 45096 was, that the word "*Friedrichshall*" was at the top of the disc, and, after dealing with *Hudson's Trade-marks*, the Lord Justice went on: "Another question might probably be raised with reference to the word '*Friedrichshall*,' whether it had been in common use, and was prominently set forth in this label. Did it or did it not require disclaimer, or raise any objection under the 73rd section of the statute? It was not a word, in our opinion, additional to the trade-mark within the meaning of sect. 74." That, therefore, was the final opinion of the Court of Appeal upon this subject. A similar point was again before the Court of Appeal in *Pinto* v. *Badman* (1), with reference to the words "*El Destino*," which were on the label. During the argument Lord Justice *Fry* said, in reply to the proposition of counsel that the words were not really part of the mark, but an addition to it, "Surely it is part of the mark, and sect. 74 has nothing to do with it" (2). That was an observation that was made during the argument, and had that been all, I should not have assumed necessarily that it was the final opinion of the Lord Justice; but when the judgment is given, I find that Lord *Esher* lays down the law applicable to such a case as I have before me in these words (3): "The truth is, that the label does not consist of each particular part of it, but consists of the combination of them all." And consequently, with reference to the term "*El Destino*," inasmuch as there were to be found in the label those things which the Act has required as essential, and the term "*El Destino*" was upon the label also, the Court of Appeal held that the case did not fall within sect. 74. Upon these authorities, therefore, I am of opinion that the Applicants cannot succeed.

The Act of 1883 unquestionably gave rise to some difficult questions with regard to additional words and the like, but it has been amended by the Act of 1888; and it is clear that, under sect. 64, as amended by that Act, the Respondent company would not be required to disclaim the words in question, because now a person, which includes a company, is not to be required to disclaim his own name. That is a proviso which does not

(1) 8 Rep. Pat. Cas. 181. (2) 8 Rep. Pat. Cas. 188.
(3) 8 Rep. Pat. Cas. 191.

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give rise to the argument that the Legislature, in framing the new sect. 64, considered that it was incumbent under the Act of 1883 to make a disclaimer of a name when added to the mark, because the 64th section, as now placed on the Statute Book by the Legislature, contains a much clearer enactment with regard to what may be added; and the proviso as to not compelling the applicant to disclaim his own name, is a proviso which relates to the new matter in the section as to the added words. Thus far, then, I think that the argument for the Applicants cannot succeed.

There is one point more. It was argued that, under the 73rd section, this trade-mark as registered could not stand, because it is not lawful to register as part of, or in combination with, a trade-mark, any words, the exclusive use of which would, by reason of their being calculated to deceive, be disentitled to the protection of a court of justice. It is said that this mark is calculated to deceive. What I stated at the commencement of this judgment is an answer to that point. This trade-mark, by using the name of the company in connection with the words "*Smokeless Powder*," does not deceive, nor is it calculated to deceive, the public into the notion that the *Smokeless Powder Company* have a monopoly in smokeless powder. As the case stands, it is right to add that the Respondent company filed an affidavit disclaiming altogether, so far as an affidavit can do so, any exclusive right founded upon those words. They have not, therefore, come here maintaining that they have any monopoly in virtue of these words; but by affidavit, before the argument, when they came into Court, they stated plainly that they did not claim any exclusive right. I mention that for the purpose of shewing that the Respondent's case is, that they have no monopoly of the words "*Smokeless Powder*" by virtue of the trade-mark—they have not gone further than that. I therefore refuse the motion.

Solicitors: *Shaen, Roscoe, Massey & Co.; Ashurst, Morris, Crisp & Co.*

W. C. D.

In re GOVERNMENTS STOCK INVESTMENT COMPANY (No. 2).

CHITTY, J.

1892 Feb. 20.

Company—Alteration of Memorandum—Objects—Extension of Business—Dissentient Minority—Conditions—The Companies (Memorandum of Association) Act, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub-ss.* 3, 5 (*a*), (*d*).

The memorandum of association of a company stated one of its objects to be, to invest in the "stocks or obligations of British, Foreign, or Colonial Governments, States, provinces, or municipalities, or of railways or other public undertakings, guaranteed by any British, Foreign, or Colonial Government, State, province, or municipality." Owing to changes in the money market, and competition with other similar companies, the money of the company could no longer be advantageously invested in the better class of securities originally authorized; and as the business of the company must either be very much restricted, or carried on at considerable risk, the Court was asked to sanction alterations in the memorandum giving (1.) a power to create a security in favour of debenture stock holders, and (2.) a power "to invest on the security of, or otherwise to acquire and hold, any bonds, debentures, debenture stock, obligations, mortgages, or securities of any companies or corporations formed under British, Foreign, or Colonial Law." Of the debenture stock holders who had expressed any opinion on the proposed alterations, eight-ninths assented, and one-ninth dissented:—

Held, that the first alteration fell within sect. 1, sub-s. 5 (*a*), as it enabled the company to carry on its business more efficiently; that the investment in the class of securities specified in the second alteration was a business which, within sect. 1, sub-s. 5 (*d*), under existing circumstances, might conveniently or advantageously be combined with the business of the company; and that the proposed alterations ought to be sanctioned, on condition that the company would undertake to give the present debenture stock holders a floating charge on its assets within four months, and to alter its name within three months, by adding some further words, so that persons dealing with it might not be misled into supposing that its investments were limited to Government securities.

PETITION.

The memorandum of association of the *Governments Stock Investment Company, Limited*, so far as material, stated the objects of the company to be:—

(1.) To receive money on deposit at interest.

(2.) To invest the money received from payments on shares in the stocks or obligations of British, Foreign, or Colonial Governments, States, provinces, or municipalities, or of railways, or other

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public undertakings, guaranteed by any British, Foreign, or Colonial Government, State, province, or municipality.

(3.) To invest the money raised on deposit in making advances on any of the foregoing securities, or in purchasing in the same.

By a special resolution of the company, duly and unanimously passed on the 29th of October, 1891, and confirmed on the 19th of November following, it was proposed to alter the memorandum by adding the following clauses:—

"(1*a*.) To borrow or raise money, or secure money, already or hereafter, from time to time borrowed or raised, by the issue of perpetual or terminable bonds, debentures, debenture stock, obligations, mortgages, and securities of all kinds, redeemable or otherwise, and to frame, constitute, and secure the said bonds, debentures, debenture stock, obligations, mortgages, and securities, in such manner and form as may seem expedient, with full power to charge and secure the same on the undertaking of the company, and on the whole or any part of its property, assets, estate, rights, and effects, present and future (including any capital from time to time uncalled) by a trust deed or otherwise, or to secure the same by deposit of securities or other property, or otherwise howsoever."

"(3*a*.) In addition to the previous powers, to invest the moneys of the company on the security of, or otherwise to acquire and hold, any bonds, debentures, debenture stock, obligations, mortgages, or securities of any companies or corporations, formed or incorporated under British, Foreign, or Colonial law, and to sell, dispose of, or vary the same."

On the 17th of December, 1891, the company presented a petition under the *Companies* (*Memorandum of Association*) *Act*, 1890, for the confirmation by the Court of the special resolution. A somewhat similar application was heard and refused in March, 1891 (1), where the facts as to the capital, incorporation of the company, the terms on which the debenture stock had been issued, and the form of the circular notice to debenture stock holders and depositors, are fully stated.

No portion of the assets of the company was specifically charged

(1) [1891] 1 Ch. 649.

or mortgaged, by trust deed or otherwise, in favour of the debenture stock holders.

It appeared that the only creditors of the company were, holders of debenture stock to the aggregate amount of £438,970, depositors to the amount of £33,706, and the directors, officers, and servants of the company.

On the 11th of January, 1892, a circular notice, similar to the one used on the previous application, was posted to all the debenture stock holders and depositors, and, in reply, debenture stock holders to the value of £267,950 assented; £29,430 dissented; £28,970 were neutral; £26,990 were passive; and the remainder, amounting to £85,630, sent no answer at all. Of the depositors, £20,857 assented; £220 dissented; £3983 were neutral; and the balance, amounting to £7346, sent no answer at all.

There was evidence in support of the petition to the effect that, owing to changes in the money market, many of the securities which the company was authorized to invest in, and which at the date of its incorporation and for some years afterwards were considered satisfactory, had become worthless, unsafe, or undesirable, thereby greatly reducing the choice of investments open to the company; that from this cause, and from the large number of trust companies that had been formed of recent years, the better class of authorized securities had risen so much in value that they could not now be purchased at prices which would yield a sufficient interest to carry out the original design of the company; that, should the directors be confined to the original class of securities, the business of the company, if it was to be carried on at all, could only be conducted with considerable risk; that under the circumstances it would be greatly to the advantage of the company if its directors could be authorized, in the manner proposed, to extend their investments to other well-known securities yielding a fair rate of interest, but not within the scope of its memorandum as originally framed.

The petition now came on for hearing.

Farwell, Q.C., and *A. D. Maclaren*, for the company:—

As to the first alteration proposed, there can be no objection to that, and it will certainly enable the company to carry on its business "more efficiently": it is within sect. 1, sub-sect. 5 (*a*).

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As to the second, we are in a better position than when we came in March, 1891; now we are supported by eight-ninths of the debenture stock holders, and the Court can and will act upon the evidence of such a general desire expressed on the part of those interested, when their consent, as here, has been properly obtained: *In re Agra and Masterman's Bank* (1). This proposed alteration is within sect. 1, sub-sect. 5 (*d*), as it will enable the company to carry on another business which can be conveniently and advantageously combined with the business of the company. This point was not sufficiently pressed when the case was before the Court on a former occasion (2). A similar order to the one we now ask was made in *In re Foreign and Colonial Government Trust Company* (3).

Sect. 1, sub-sect. 3, enables the Court to confirm a resolution subject to conditions, and the company is willing to alter its name in such a way that the public may not be misled.

The evidence shews that if the company is not allowed a wider field for investment, it cannot carry on its business, except at considerable risk.

Byrne, Q.C., and *Disturnal*; *R. B. Yardley*, and *John Chester*, for debenture stock holders, supported the petition.

R. F. Norton, for a debenture stock holder for £1000:—

There can be no objection to the first alteration proposed; but as to the second, the company, on their own evidence, are asking to decrease the value of my security, by investing their assets on other securities which do not stand so high in the market as those they now hold. This is not a case in which a majority can bind the minority. *In re Foreign and Colonial Government Trust Company* is quite different; there were no debenture holders in that case, and no opposition from any one.

Farwell, in reply.

CHITTY, J.:—

This application is a very different one to that which I refused when this company presented its former petition. The proposed

(1) Law Rep. 12 Eq. 509, n. (2) [1891] 1 Ch. 649.
(3) [1892] 2 Ch. 395.

alterations are two. The first, in short, is to enable the company to give security to its debenture holders; and the second is to enlarge the scope of the investment clause by the addition of "bonds, debentures, debenture stock, obligations, mortgages, or securities of any companies or corporations formed or incorporated under British, Foreign, or Colonial law."

As to the first point, the only holder of any debenture stock who appears at the Bar to oppose, has not opposed on that ground. The position of the debenture stock holders at the present moment is this: they are entitled to be paid a perpetual interest out of the assets of the company. They have no security direct. They have no hold upon any portion of the company's assets, either by themselves or by means of a trustee; but the company has, by means of its share capital, and of the money borrowed on debenture stock, and of the money received on deposit, in hand, to invest, a sum of money amounting in the whole to about one million and a half; and as the debenture stock, speaking in round numbers, represents about a third of that sum, the debenture stock holders have, in a company of this kind, what in effect is a security, although, as I have said, there are no parts of the assets of the company which are mortgaged to them or in any way charged in their favour.

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I consider that as to the first proposed alteration, it falls within clause (*a*) of the 5th sub-section of sect. 1 of the Act of 1890.

Then, as to the second proposed alteration, which involves the enlargement of the power of investment, no doubt this company as it now stands constituted was, as its name imports, a company whose money was to be invested on the stock of governments, using the word "governments" in a very wide sense, so as to include municipalities; and no doubt what is proposed is a new branch of business, and one that is not covered by the existing title of the company. The debenture holder who alone opposes holds £1000 out of the £438,970 debenture stock. The debenture holders who assent amount to £267,950, the dissentients £29,430; those who stand neutral, and those who, according to their answers, remain passive, which is the same thing as remaining neutral, amount altogether to about £56,000 in round numbers. Comparing the figures of the assenting and dissenting,

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the result is that eight-ninths of the total are assenting, and one-ninth are dissenting. That is a very large majority, and a much greater majority than that which I had when the case was before me on the previous occasion. At the same time, as I then observed, this is not a question simply to be decided by the votes of the majority. It is the duty of the Court itself to protect the absent, and to look into the matter to see whether the proposal is a fair and reasonable one, and, of course, to ascertain that it is within the scope of the statute.

Now, it appears to me that the enlargement of the investment clause falls under sect. 1, sub-sect. 5 (*d*), namely, "To carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company." The affidavits which have been filed in support, are sufficient to justify my holding as a fact that the case falls within clause (*d*). The evidence is to this effect: that having regard to what has occurred, particularly in the last year or so, in the money market, to the fall of certain securities which are within the scope of the memorandum as it now stands, and having regard to the competition for similar securities or investments which exists now between this and the numerous other companies, the carrying on of the business of obtaining the additional securities is one which may be conveniently and advantageously combined with the existing business of the company.

That being so, I consider it is my duty to confirm the resolution, which, I think, is for the advantage of the company. Mr. *Norton*, appearing for a debenture-holder for £1000, argued, that he had now, what was in substance and in the result, a security on Government investments, and said that to let in these new securities would depreciate the security which he thus indirectly held. In my opinion, that argument, although there is much ingenuity in it, cannot be sustained on the facts, because there are several of the subsisting investments (I desire to speak with great reserve with regard to a company of this kind) which would not be picked out at the present day. There are several investments which have been depreciated, particularly by what has happened on the other side of the *Atlantic;* and it would be an unsafe and a hazardous thing for the company, having money now to invest,

to embark in several of those Government investments which, at the time they were made, stood well in the market; and one of the objects of the new investment clause is to give the directors, in the exercise, of course, of an honest discretion, the means of avoiding these unsafe and hazardous investments. Then, if they had to avoid them, they would, as many other of these companies would, be competing in the market for the better class of securities; and that would, as not an improbable consequence, result to the detriment of those who were interested in the company; whereas, I am satisfied, that if the directors exercise the proposed new powers of investment honestly and with prudence, (and there is no reason to doubt either their honesty or their prudence), the securities of the debenture stock holders will not be substantially, or in any material degree, imperilled or impaired.

That being my opinion, I think I should make an order confirming the proposed alteration. During the argument it has been suggested that certain conditions should be imposed, and I certainly think that one of those conditions should be the alteration of the name of the company by the insertion of the words "and other securities," or words to that effect, so as to shew that the company's investments are no longer confined to Government stocks, and that persons dealing with it may not be misled; but I will not make the alteration of the name of the company a condition precedent to confirming the resolution; the company must take immediate steps to alter its name as suggested. Then it must also give the existing debenture stock holders a floating charge on its assets.

[After some further discussion as to the time within which these conditions were to be carried out, the following order was made: "The company by its counsel undertaking to alter its name by adding the words, 'and other securities,' within three months, and to give the present debenture stock holders a floating charge on the assets of the company within four months, the Court confirms the special resolutions."]

Solicitors: *Davidson & Morriss; H. F. Barnett; Howlett, Preston & Co.; Frederick Hill; Ridsdale & Son.*

W. C. D.

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Feb. 20.

In re LONDON AND SUBURBAN BANK.

[1892 L. 033.]

Company — Winding-up — Jurisdiction — Industrial and Provident Society— Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *ss.* 1, 2, 3— *Industrial and Provident Societies Act*, 1876 (39 & 40 *Vict. c.* 45), *s.* 17 [*Revised Ed. Statutes, vol. xviii., p.* 156].

A society registered under the *Industrial and Provident Societies Act*, 1876, is not within the *Companies (Winding-up) Act*, 1890, and cannot be wound up under that Act.

Such a society can only be wound up by the proper County Court under the provisions of the Act of 1876 and the *County Court Acts.*

THIS was a petition by creditors for the winding up of the *London and Suburban Bank, Limited,* by the Court. The petition was intituled, "In the matter of the *Companies Acts*, 1862 to 1890; and In the matter of the *Industrial and Provident Societies Act*, 1876."

The company was registered in December, 1886, under the provisions of the *Industrial and Provident Societies Act*, 1876, its registered office being at Nos. 44 and 46, *Leadenhall Street*, in the City of *London.* The nominal capital was £9085, divided into 1817 shares of £5 each. The amount of the capital paid up, or credited as paid up, was £2214 15s.

Cozens-Hardy, Q.C., and *Stock*, for the Petitioners:—

There is a preliminary question whether, under the *Companies (Winding-up) Act*, 1890, this Court has jurisdiction to wind-up a society such as this, which was incorporated by registration under the *Industrial and Provident Societies Act*, 1876, and has not been registered under the *Companies Acts.* Prior to the passing of the Act of 1890 the only Court which had jurisdiction to wind up such a society was the County Court of the district in which its office was situate: *Industrial and Provident Societies Act*, 1876, s. 17, sub-s. 1. Before the Act of 1876 some doubt had been entertained as to the jurisdiction to wind up such companies, but that Act made the matter clear. Societies registered under that Act have all the characteristics of "companies."

Their object is the acquisition of gain, and a member can transfer his shares without the consent of the other members: *Smith* v. *Anderson* (1). They are really "companies" in all but the name, and sect. 17, sub-sect. 1, expressly enacts that the provisions of the *Companies Act*, 1862, shall apply to any order to wind up such a society, though the Court having jurisdiction in the winding up is to be the County Court, and the provisions as to the liability of members, &c., are the same as those contained in the *Companies Act*, 1862.

[NORTH, J.:—No doubt a society under the Act of 1876 is very similar to a company under the *Companies Act*, 1862. But the fact that all those provisions were inserted in the Act of 1876 tends to shew that such societies are not companies under the *Companies Act*, for otherwise it would have been unnecessary to repeat those provisions. There are two distinct codes, and the title of the Act of 1890 is, "An Act to amend the law relating to the winding up of Companies in *England* and *Wales*."]

The Act of 1890 (2) is a perfectly general Act, and applies to

(1) 15 Ch. D. 247.

(2) Sect. 1 (1.) "The Courts having jurisdiction to wind up companies in *England* and *Wales* shall be the High Court, the Chancery Courts of the Counties Palatine of Lancaster and Durham, the County Courts, and the Stannaries Court."

(2.) "Where the amount of the capital of a company paid up or credited as paid up exceeds ten thousand pounds, a petition to wind up the company or to continue the winding up of the company under the supervision of the Court shall be presented to the High Court, or, in the case of a company situate within the jurisdiction of either of the Palatine Courts aforesaid, either to the High Court or to the Palatine Court having jurisdiction."

(3.) "Where the amount of the capital of a company paid up or credited as paid up does not exceed ten thousand pounds, and the registered office of the company is situate within the jurisdiction of a County Court having jurisdiction under this Act, a petition to wind up the company or to continue the winding up of the company under the supervision of the Court shall be presented to that County Court."

(5.) "The Lord Chancellor may by order exclude a County Court from having jurisdiction under this Act, and for the purposes of such jurisdiction may attach its district, or any part thereof, to the High Court or to any other County Court, and may revoke or vary any such order. In exercising his powers under this section the Lord Chancellor shall provide that a County Court shall not have jurisdiction under this Act unless it has for the time being jurisdiction in bankruptcy."

(7.) "Nothing in this section shall

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all "companies," including societies registered under the Act of 1876. There is no exception of such societies from the Act of 1890.

[NORTH, J.:—I think it was decided that the Court of Chancery had no jurisdiction under the *Companies Act*, 1862, to wind

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invalidate a proceeding by reason of its being taken in a wrong Court."

Sect. 2: "Subject to general rules and to orders of transfer made under the authority of the Supreme Court of Judicature Act, 1873, and the Acts amending it, the jurisdiction of the High Court under this Act shall, as the Lord Chancellor may from time to time by general order direct, be exercised, either generally or in specified classes of cases, either by such Judge or Judges of the Chancery Division of the High Court as the Lord Chancellor may assign to exercise that jurisdiction, or by the Judge who, for the time being, exercises the bankruptcy jurisdiction of the High Court."

Sect. 3—(1.) "The winding up of a company or any proceedings therein may at any time and at any stage, and either with or without application from any of the parties thereto, be transferred from one Court to another Court, or may be retained in the Court in which the proceedings were commenced, although it may not be the Court in which the proceedings ought to have been commenced.

(2.) "The powers of transfer given by the foregoing provisions of this section may, subject to and in accordance with general rules, be exercised by the Lord Chancellor or by any Judge of the High Court having jurisdiction under this Act, or, as regards any case within the jurisdiction of any other Court, by the Judge of that Court."

On the 29th of November, 1890, the Lord Chancellor made an order "that a County Court which at the time of the coming into operation of the *Companies (Winding-up) Act*, 1890, is excluded from having jurisdiction in bankruptcy, shall be excluded from having jurisdiction under the *Companies (Winding-up) Act*, 1890, until further order, and the district of any such County Court shall, for the purposes of jurisdiction under the *Companies (Winding-up) Act*, 1890, be attached until further order to the Court to which that district is attached at the time of the coming into operation of this Act for the purposes of jurisdiction in bankruptcy."

The City of *London* Court was, at the time of the coming into operation of the Act of 1890, excluded from jurisdiction in bankruptcy, the district being attached, for the purposes of bankruptcy, to the *London* Bankruptcy Court—*i.e.*, the High Court; and consequently, if the Act of 1890 applied to societies registered under the Act of 1876, the jurisdiction to wind up this bank under the Act of 1890 would be in the High Court.

The *Industrial and Provident Societies Act*, 1876, provides, by sect. 17, sub-sect. 1: "A registered society may be dissolved by an order to wind up the society, or a resolution for the winding up thereof, made as is directed in regard to companies by the *Companies Act*, 1862, the provisions whereof shall apply to any such order or resolution, except that the Court having jurisdiction in the winding-up shall be the County Court."

up as an unregistered company an industrial society which had not been registered under the *Industrial Societies Act.*

Ingle Joyce:—That was so decided in *In re Chatham Co-operative Industrial Society* (1), in which *Wood*, V.-C., said that the same point had been decided by the Lord Chancellor in a previous case (2).

NORTH, J., referred to *In re No.* 3 *Midland Counties Benefit Building Society* (3).]

Cozens-Hardy:—In *Lindley* on the Law of Companies (4), it is said (speaking of industrial and provident societies): "Societies not registered under the Act, but capable of being registered under it, may apparently be wound up either in the Chancery Division of the High Court, or in the County Court."

[NORTH, J.:—Sect. 1 of the Act of 1890 says that proceedings are not to be invalidated by reason of their being taken in a wrong court. I might make an order to wind up the bank, and then under sect. 3 transfer the proceedings to the County Court.

Joyce:—Those provisions apply only to companies which are within the Act, and my argument will be that this society is not within the Act.]

The provisions of the Act of 1876 as to the winding up of these societies are impliedly repealed by the Act of 1890, which is inconsistent with them. In most cases in which it has been held that a prior Act has not been repealed by a subsequent general Act, the earlier Act has been a private or local one: *O'Flaherty* v. *M'Dowell* (5); *Fitzgerald* v. *Champneys* (6).

When the Act of 1890 was passed, the Legislature must have had the Act of 1876 in their contemplation.

Chubb, for creditors supporting the petition:—

Sect. 69 of the *County Courts Act*, 1888, enables the Court, when any action or matter is pending in the Chancery Division which might have been commenced in a County Court, to transfer it to the County Court.

(1) 33 L. J. (Ch.) 737.
(2) Not reported.
(3) 4 D. J. & S. 468.
(4) 5th Ed. p. 916.
(5) 6 H. L. C. 142, 162.
(6) 2 J. & H. 31.

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[NORTH, J.:—Is there any matter pending here yet?]

Bramwell Davis, for the bank, submitted the question to the Court.

Ingle Joyce, for shareholders; and *Boome*, for shareholders and creditors; who opposed the petition, were not called upon.

NORTH, J.:—

I think this point is reasonably free from doubt. Before the passing of the *Industrial and Provident Societies Act*, 1876, previous Acts had enabled industrial and provident societies to register under those Acts, and had provided a mode by which societies so registered might be wound up in the County Court. And it had been held in *In re Chatham Co-operative Industrial Society* (1), that, if such a society had not been registered under the Act then in force, the Court of Chancery had not jurisdiction to wind it up, and it could not, therefore, be wound up by any Court. A great deal of argument has been addressed to me to shew that an industrial and provident society is a company. In one sense, no doubt, it may be called a company, in the sense in which the word is used by Lord Justice *Lindley*, in his book on the Law of Companies, where he says (2), "Industrial and provident societies, as governed by the *Industrial and Provident Societies Act*, 1876, are a peculiar kind of limited joint stock company"; and he goes on to state the particulars in which those societies resemble limited companies. But I find that in the Acts relating to these societies rules have been laid down for their regulation and defining the rights and liabilities of their members, which are very similar to the rules contained in the *Companies Act*, 1862, in relation to companies under that Act, and this seems to me to negative the inference that these societies are companies under the *Companies Act*. Such societies and such companies are governed by two very similar codes; they are not governed by the same code. It is admitted that, before the *Companies (Winding-up) Act*, 1890, such a society as this could not have

(1) 33 L. J. (Ch.) 737.

(2) 5th Ed. p. 915.

been wound up by the High Court. But it is said that a new jurisdiction has been conferred on the High Court by the Act of 1890, and, indeed, the argument must go to this length, that the Act of 1876 has been, to some extent, repealed by the Act of 1890—that is, as regards all industrial societies, the paid-up capital of which exceeds £10,000. In my opinion, the Act of 1890 does not apply at all to industrial and provident societies. The title is, "An Act to amend the law relating to the winding up of companies in *England* and *Wales*," and sect. 1 prescribes the Courts which are to have jurisdiction to wind up companies in *England* and *Wales*. But I cannot find any section which indicates that the word "company" in the Act was intended to apply to anything which was not governed by the law which was to be amended by the Act, and, in my opinion (with the exception of companies subject to the jurisdiction of the Chancery Courts of *Lancaster* and *Durham*, and the Stannaries Court), the Act applies only to companies which, before it was passed, would have been wound up by the Chancery Division of the High Court. Moreover, sect. 16 of the Act of 1876 provides, in sub-sect. 4, a mode by which a society registered under that Act may convert itself into a company under the *Companies Acts*. On the face of the Act of 1876, therefore, a clear distinction is drawn between a society under that Act and a company under the *Companies Acts*, because that Act provides a mode in which such a society may convert itself into a company under the *Companies Acts*. Again, rule 2 of the Companies (Winding-up) Rules, 1890, defines "the company" as meaning "a company which is being wound up, or against which proceedings to have it wound up have been commenced." I think this refers only to a company which is being wound up under the Act of 1890, and it does not throw any light upon the question whether a society registered under the *Industrial and Provident Societies Act* is a company capable of being wound up under the Act of 1890. And, though this is not in any way binding upon me, it is a noticeable thing that those who are responsible for the making of rules regulating the practice of the County Courts have not adopted the view that industrial and provident societies can be wound up under the *Companies (Winding-up) Act*, 1890, and in that way obtain

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the benefit of the new procedure introduced by that Act, for, by Order XLI., rule 9 of the County Court Rules, 1892, it is expressly provided that "the provisions of the *Companies Acts*, 1862 to 1890, and the rules made thereunder, so far as they relate to winding up, shall apply to the winding up of societies registered under 'The *Building Societies Act*, 1874,' and 'The *Industrial and Provident Societies Act*, 1876;' and the winding up of any such societies shall be conducted in all respects as if such societies were companies registered under any of the said *Companies Acts*." This provision would have been wholly unnecessary if these societies had been companies within the Act of 1890. It is true that this rule is not a precedent which I am bound to follow; but it shews that the view which I have taken of the construction of the Act of 1890 is shared by the framers of the County Court Rules.

I should have been prepared, if I had been requested to do so, to make an order for the winding up of this society, and then to have transferred the proceedings to the County Court. Mr. *Joyce* has suggested a difficulty in the way of my doing this; but I am inclined to think that that difficulty might have been surmounted. However, I have not been asked to adopt that course, and I can only dismiss the petition with costs.

Solicitors: *J. Hextall; G. J. B. Porter; Rossiter; S. Evans; A. E. Prior.*

W. L. C.

PENDARVES *v.* MONRO.

NORTH, J.

1892

Feb 19, 26.

[1892 P. 254.]

Easement—Light—Extinguishment of Easement.

Where a new building has been erected on the site of an ancient building, in order to entitle the owner of the new building to access of light, it is necessary to shew that some defined part of an ancient window admitted access of light through the space occupied by a defined part of an existing window.

THIS was an action brought by the ground landlords of premises in the occupation of the *Metropolitan Electric Supply Company* in *Sardinia Place* (formerly *King's Head Yard*), *Lincoln's Inn Fields*, to restrain the Defendant from erecting new buildings on the opposite side of *Sardinia Place*, so as to obstruct the access of light to the Plaintiffs' premises as such light had been enjoyed before the commencement of alterations in the Defendant's premises. The action was brought on, on motion on the part of the Plaintiffs, for an interlocutory injunction.

The front of the Plaintiffs' premises, in their present state, have an elevation of about forty feet of three floors. On each floor there are six windows or doors, eight feet eight inches wide, two feet three and a half inches apart. They stand on the site of an old public-house called the White Horse, and an old house known as 1, *King's Head Yard*. These two houses were pulled down in 1872. In 1876 new buildings were erected; the line of frontage was then rectified, the new building being put forward in part and back in part. A fire occurred since; but the front elevation is the same as was put up in 1876.

The strongest evidence that the access of light to the existing building of the Plaintiffs at all coincided with the access to light to the old buildings, was contained in an affidavit of *Charles Adams*, the occupier of the White Horse from April, 1869, to Michaelmas, 1872. He deposed:—

"The said White Horse public-house consisted of the following rooms, &c., facing *King's Head Yard*:—

"(1.) On the ground floor, the bar, bar parlour, tap-room, and

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public parlour, which had three windows opening into *King's Head Yard*, each of which were about five feet in height and three and a half feet wide. Adjoining the ground floor of the White Horse, to the north-west, and under the first and second floors thereof, there was a passage leading to the back premises with a gate, of which I kept the key; and there was also a side entrance into this passage from the White Horse.

"(2.) On the first floor there was one room over the gateway, with two windows; a large room over the bar and tap room, also with two windows; a landing with a window, and one room over the public parlours with one rather large window, making in all six windows, all of which looked into *King's Head Yard*. Most of these windows were, to the best of my belief, not quite so broad as those on the ground floor, but they were longer.

"(3.) On the second floor there were also six windows immediately over those on the first floor, although these windows were somewhat smaller.

"On the ground floor of No. 1, *King's Head Yard*, there were two windows, on the first floor two windows, on the second floor two windows, and on the third floor two windows, all of which opened into *King's Head Yard*.

"Speaking to the best of my recollection, the height of the front wall of the White Horse, facing *King's Head Yard*, was between thirty and thirty-five feet, and there were two tile-covered span roofs. The front wall of No. 1, *King's Head Yard*, was probably six or seven feet higher than that of the White Horse.

"I know the building occupied by the *Metropolitan Electric Supply Company, Limited*, which now stands upon the site of the White Horse and No. 1, *King's Head Yard*, and I have looked at the present windows which open into *Sardinia Place*. Speaking to the best of my recollection as to the old windows of the White Horse and No. 1, *King's Head Yard*, and considering the width of the present windows and the width of the spaces between those windows, I believe that the present windows cover in whole or in part the ancient lights of the White Horse, and No. 1, *King's Head Yard* aforesaid, which formerly opened into *King's Head Yard*."

Cozens-Hardy, Q.C., and *Methold*, for the Plaintiffs:—

The evidence shews that some part of the ancient windows coincide with part of the new windows of the Plaintiffs' buildings.

[NORTH, J.:—That is not enough, unless you can shew which parts of the new windows are coincident with old lights: *Fowlers* v. *Walker* (1).]

It is not necessary, in order to uphold that decision, to go so far as that. From the judgment of the Vice-Chancellor in the Court below, and the way it was referred to in *Scott* v. *Pape* (2), it appears that in that case it was considered that the whole structure of the plaintiff's building had been altered to an extent that amounted to abandonment. But we submit the evidence of *Adams* shews that particular parts of at least the existing ground-floor windows do coincide with parts of the old windows.

S. Hall, Q.C., and *MacSwinney*, for the Defendant:—

This case is within the decision of *Fowlers* v. *Walker*, a case decided in the Court of Appeal and approved of in *Scott* v. *Pape*.

Cozens-Hardy, in reply.

NORTH, J. (after deciding a question of conduct in the Plaintiffs' favour, continued):—

I do not see my way to granting an injunction. The real question is whether the windows in the building put up in 1876 have been shewn as to any particular or defined part to coincide with those in the older buildings pulled down in 1872. Now, the only material evidence is that of the witness *Adams*. [After referring in detail to the affidavit of *Adams*, his Lordship continued:—] I think very probably he is right in saying that the present windows cover in part the space occupied by old windows, but as to which part or parts I have no evidence.

The case of *Fowlers* v. *Walker* is, in my opinion, important. It was in its facts very like the present one, and it did not depend at all upon any question as to abandonment. The plaintiff's premises in that case were a warehouse standing on the

(1) 51 L. J. (Ch.) 443. (2) 31 Ch. D. 554.

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site of old houses. It was known where the old buildings had stood; that they were three-storied houses with windows in front; the number and the dimensions of the old windows were known; the width of each house was so narrow that there could not have been any difficulty in coming to the conclusion that some part of the former windows had occupied the site of parts of the existing windows, especially as the new buildings had so much window that the front and side were almost all glass. But by reason of the impossibility of defining precisely where the old windows had been, and the impossibility of identifying any part of the new windows as coincident with a particular part of an ancient light, the plaintiff's case failed for want of evidence. It was held there that there was not sufficient to enable the Court to do what Mr. *Hardy* asked me to do in this case, namely, to draw the inference that some definite part of an old window coincided with some part of the new windows. In my opinion, the facts proved in that case were stronger than they are here, yet the plaintiffs failed, because it was held that it had not been shewn that any light used to pass through any particular part of an existing window. It is unnecessary to say anything about the effect of the alteration of the planes of the Plaintiffs' windows. By reason of the omission to keep any plan, there is no evidence that satisfies me that any part of an old window can be identified with any part of an existing window. Under those circumstances, I refuse the motion.

Solicitors for Plaintiffs: *Woodrooffe & Burgess.*
Solicitors for Defendant: *Button & Co.*

D. P.

In re REVERSIONARY INTEREST SOCIETY, LIMITED.

NORTH, J.

1892

March 5.

[1891 R. 0343.]

Company—Alteration of Deed of Settlement—Confirmation by Court—Deed of Settlement modified by Private Act—Companies (Memorandum of Association) Act, 1890 (53 & 54 *Vict. c.* 62), *ss.* 1, 3.

A reversionary interest society was constituted in 1823 by a deed of settlement, which provided that the object and business of the society should be to purchase reversionary interests of every description in real and personal property (except advowsons and next presentations), and also to purchase life or other partial interests the reversions expectant on which might have been previously purchased by the society, and to purchase life policies of insurance. In 1845 a private Act was passed, which empowered the society to increase its capital, and this was done in 1846. In 1857 another private Act was passed, which provided that the society might purchase life and other partial interests of every description in real and personal property, whether vested or contingent, so as the interests to be so purchased should be either to determine or to take effect upon the decease of a person or persons, except interests in advowsons and next presentations to ecclesiastical benefices, but including rents and annuities of every description given or granted for a life or lives, or for a term or terms of years determinable upon the dropping of a life or lives; and that the society might lend money as well upon real security as upon the security of any interest in real or personal property which the society was authorized to purchase by the deed of settlement or by this Act. In 1880 the society was registered as a company with limited liability, under the *Companies Act*, 1862. In 1891 the society, by a special resolution, resolved to add the following clause to the deed of settlement: "That the society may from time to time borrow and raise money for the purposes of the society's business, and secure the repayment thereof by bonds, debentures, debenture stock, or mortgage debentures, perpetual or determinable (payable to bearer or otherwise), and with or without a trust deed, and for this purpose may mortgage or charge the undertaking and all or any of the property of the society, including its capital for the time being uncalled; provided that the total indebtedness of the society under this clause shall not at any time exceed the amount of the paid-up capital of the society for the time being." The proposed alteration did not affect any of the provisions of the private Acts:—

Held, that, notwithstanding the private Acts, the constitution of the society was such that the provisions of the deed of settlement could be altered under the *Companies (Memorandum of Association) Act*, 1890.

Held, also, that the proposed addition came within sub-sect. 5 (*a*) of sect. 1 of the Act, and the Court accordingly confirmed it.

PETITION by the *Reversionary Interest Society, Limited*, under the *Companies (Memorandum of Association) Act*, 1890, asking for

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the confirmation by the Court of a special resolution for the alteration of the deed of settlement of the society.

The society was originally constituted with the above name (without the word "Limited") by a deed of settlement, dated the 31st of May, 1823. The deed provided that the capital of the society should not exceed the sum of £500,000, in 5000 shares of £100 each; and that the object and business of the society should be to purchase reversionary interests of every description in real and personal property (except advowsons and next presentations), and also to purchase life or other partial interests the reversions expectant on which might have been previously purchased by the society, and also to purchase life policies of insurance. The deed provided that meetings of the shareholders should be styled general courts; that two successive extraordinary general courts specially called for the purpose should have full power to make any new laws, regulations, or provisions, or to amend, alter, or repeal all or any part of the existing regulations and provisions, provided such new, amended or altered laws, regulations, and provisions should have been first approved of and recommended by the board of directors; that in all cases unprovided for by the existing laws and regulations it should be lawful for the board to act in such manner as should appear to them best calculated to promote the welfare of the society, and to make whatever rules and bye-laws the said board should think proper, provided the same should not be inconsistent with or repugnant to the fundamental principle or constitution of the society as established by the deed of settlement, or as altered by the power thereinbefore given for that purpose.

The deed of settlement did not expressly state or define the fundamental principle or constitution of the society.

Prior to May, 1830, only £275,400 of the authorized capital of the society had been issued.

At two successive extraordinary general courts of the society, held in the month of May, 1830, the deed of settlement was altered by (*inter alia*) authorizing the directors to extend the capital of the society to such an extent as they might consider expedient by the creation and issue of new shares. In pursuance of this power a further sum of £263,300 was raised by the issue

of 2633 shares of £100 each, thus making the total issued capital of the society £538,700.

In 1845 an Act was passed (8 & 9 Vict. c. cxlvi.) for granting certain powers to the society. This Act empowered the society, with the consent of the majority therein mentioned of the persons present at two successive general courts of the society, to raise, in addition to the £500,000 authorized by the deed of settlement, any sums not exceeding in the whole £500,000, provided that any sum already raised by the society in addition to the said £500,000 under the deed of settlement, should form part of the additional sum of £500,000 by the Act authorized to be raised.

At two successive extraordinary general courts held in April and May, 1846, resolutions were passed by the majorities required by the Act, to the effect that 4613 shares of £100 each should be created and offered for issue; that £5 per share should be paid upon allotment; that no subsequent instalment should be of a greater amount than £5; and that an interval of not less than six months should be allowed between each call. Of the 4613 shares only 1045 had been issued, and only £25 per share had been called up on them.

In the year 1857 another Act was passed (20 & 21 Vict. c. iii.), by which it was enacted (*inter alia*) that the society might purchase life and other partial interests of every description in real and personal property, whether vested or contingent, so as the interests to be so purchased should be either to determine or to take effect upon the decease of a person or persons, except interests in advowsons and next presentations to ecclesiastical benefices, but including rents and annuities of every description given or granted for a life or lives, or for a term or terms of years determinable upon the dropping of a life or lives; and that the society might lend money as well upon real security as upon the security of any interest in real or personal property which the society was authorized to purchase by the deed of settlement or by this Act.

On the 12th of March, 1880, the society was registered as a company with limited liability, under the *Companies Act*, 1862, as having a nominal capital of £643,200, divided into 6,432 shares of £100 each, of which 5,387 had been fully paid up, and

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on the remaining 1045 of which only £25 per share had been paid up.

Neither the deed of settlement nor either of the special Acts contained an express power for the society to borrow money otherwise than has been already stated.

At the extraordinary general courts of the society, held respectively on the 30th of July and the 27th of August, 1891, a special resolution was duly passed and confirmed, in accordance with sect. 51 of the *Companies Act*, 1862, that the following clause be added to the deed of settlement:—

"That the society may from time to time borrow and raise money for the purposes of the society's business, and secure the repayment thereof by bonds, debentures, debenture stock, or mortgage debentures, perpetual or determinable (payable to bearer or otherwise), and with or without a trust deed; and for this purpose may mortgage or charge the undertaking and all or any of the property of the society, including its capital for the time being uncalled, provided that the total indebtedness of the society under this clause shall not at any time exceed the amount of the paid-up capital of the society for the time being."

The society had never issued any debentures or debenture stock.

The petition alleged that "the alteration of and addition to the deed of settlement referred to in the special resolution is required in order to enable the society to carry on its business more economically and more efficiently, and to attain its main purpose by new and improved means, and to enlarge the local area of its operations, and to carry on the business of borrowing and raising money as mentioned in the special resolution, which business under existing circumstances can conveniently and advantageously be combined with the business of the society. The petition also alleged that "no one will be prejudiced by the proposed alteration of and addition to the deed of settlement."

The special resolution was passed at the court on the 30th of July, 1891, without any dissentient, and at the court on the 27th of August, 1891, it was confirmed with only one dissentient, who was the holder of capital to the amount of £3300.

The aggregate amount of the capital held by the shareholders who at one or other of the two courts supported the resolution was £221,400.

The petition asked that the special resolution might be confirmed by the Court pursuant to the Act of 1890.

On the 1st of February, 1892, on the application of the petitioners, Mr. Justice *North* ordered that advertisements should be issued for persons claiming to be creditors of the society to send in their claims on or before the 29th of February. No claim was made in answer to the advertisements. Other persons had previously been admitted to be creditors of the society, and all those persons had consented to the alteration and addition mentioned in the special resolution.

There was evidence that the proposed alteration and addition would be of great advantage to the society and its members, and that it was, in fact, requisite (for reasons stated) for the society to be invested with a power to raise borrowed capital. The business had for a number of years been carried on at a considerable profit.

The proposed alterations did not in any way affect the provisions of either of the above-mentioned private Acts.

Cozens-Hardy, Q.C., and *Eastwood*, for the Petitioners:—

The first question is, whether the definition of "deed of settlement" contained in sect. 3, sub-sect. 3 (1), of the *Companies*

(1) By sect. 1, sub-sect. (1): "Subject to the provisions of this Act, a company registered under the *Companies Acts*, 1862 to 1886, may, by special resolution, alter the provisions of its memorandum of association or deed of settlement with respect to the objects of the company, so far as may be required for any of the purposes hereinafter specified, or alter the form of its constitution by substituting a memorandum and articles of association for a deed of settlement, either with or without any such alteration as aforesaid, with respect to the objects of the company, but in no case shall any such alteration take effect until confirmed on petition by the Court which has jurisdiction to make an order for winding up the company."

Sub-sect (5): "The Court may confirm, either wholly or in part, any such alteration as aforesaid with respect to the objects of the company if it appears that the alteration is required in order to enable the company (*inter alia*):—

"(*a.*) To carry on its business more economically or more efficiently; or

"(*b.*) To attain its main purpose by new or improved means; or

"(*d.*) To carry on some business or

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(*Memorandum of Association*) *Act*, 1890, prevents the application of that Act to the present case. It is submitted that it does not. The original deed of settlement in the present case is entirely distinct from the two private Acts, and the proposed alterations will not affect any of the provisions of those Acts; they only alter or add to provisions of the original deed.

NORTH, J.:—

I think the present case falls within the definition of "deed of settlement" contained in sect. 3, sub-sect. 3. I have, therefore, jurisdiction to entertain the petition.

Cozens-Hardy, Q.C., and *Eastwood*, for the Petitioners:—

The proposed alterations of the deed of settlement come within clause (*a*) of sub-sect. 5. The society will be able to carry on a larger business with a smaller rateable expenditure; in other words, "to carry on its business more economically or more efficiently." Clauses (*b*) and (*d*) also apply: *In re Governments Stock Investment Company* (1); *Re Empire Trust* (*Limited*) (2).

NORTH, J.:—

I think the proposed alterations come within clause (*a*) of sub-sect. 5. I doubt whether clause (*d*) applies. I do not see that there is any new business which it is intended to combine with the old business of the company. The intention is to carry on the existing business on a larger scale. I do not require much evidence to convince me that a society of this kind can carry on its business more efficiently if it has more money. There is nothing to shew that the supply exceeds the demand. I will confirm the resolution.

Solicitors: *Radcliffes, Cator, & Hood.*

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businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company."

By sect. 3, sub-sect. (3): "In this Act the expression 'deed of settlement' includes any contract of co-partnery, or other instrument constituting or regulating the company and not being an Act of Parliament, a royal charter, or letters patent."

(1) *Ante*, p. 597.

(2) 64 L. T. (N.S.) 221.

W. L. C.

STIRLING, J.

1891 Nov. 3; 1892 Jan. 14.

In re WALKER.
SHEFFIELD BANKING COMPANY *v.* CLAYTON.

[1889 W. 3519.]

Principal and Surety—Counter-security given by Debtor to Surety—Right of Creditor to benefit of.

The proposition that the principal creditor is entitled to the benefit of all counter bonds or collateral security given by the principal debtor to the surety cannot be supported. *Mawer* v. *Harrison* (1), cited in 1 Eq. C. Ab. p. 93, pl. 5, as the authority for that proposition, is not a decision to that effect.

FURTHER CONSIDERATION.

This was an action to administer the estate of *Hugh Walker*, deceased.

On the 7th of May, 1885, the testator guaranteed the current account of Messrs. *Spencer Brothers*, of *Sheffield*, with the *Sheffield and Rotherham Banking Company, Limited*, to the extent of £1000.

By an indenture, dated the 1st of August, 1885, *Arthur Spencer*, a member of the firm of *Spencer Brothers*, in consideration of the above-mentioned guarantee, assigned to the testator by way of mortgage, but subject to a previous mortgage, certain hereditaments at *Sheffield*, and covenanted to indemnify the testator in respect of his guarantee. On the 5th of July, 1886, the testator gave to the *London and Yorkshire Bank, Limited*, to whom the banking account of *Spencer Brothers* was then transferred, a guarantee to secure the payment of all moneys then or thereafter payable to the said bank by the firm of *Spencer Brothers*, not exceeding £1000. On the same date *Agnes Spencer*, the wife of *Arthur Spencer*, as a security against this guarantee, executed to the testator a memorandum of deposit of title deeds, relating to certain property belonging to her, and by a further memorandum, dated the 18th of August, 1886, in which her husband also joined, Mrs. *Agnes Spencer* agreed to execute a legal mortgage to the testator of the property comprised in the

(1) 1 Eq. C. Ab. 93; 20 Vin. Abr. 102.

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equitable mortgage to secure the said sum of £1000 and interest. On the 9th of September, 1887, the banking account of *Spencer Brothers* was, with the approbation of *Agnes Spencer*, transferred to the Plaintiffs, the *Sheffield Banking Company, Limited*, and on the same date the testator, with the full knowledge and approbation of Mrs. *Spencer*, gave the following guarantee to the Plaintiffs:—"In consideration that you will make advances and grant other accommodation at your discretion to the firm of *Spencer Brothers*, of *Sheffield Moor, Sheffield*, wholesale grocers, I hereby guarantee the payment of all such moneys as the said *Spencer Brothers* are, or may become, liable to pay to you on current account or on any other account or in any manner whatsoever, but so that the total amount recoverable under this guarantee shall not exceed two thousand pounds . . . And this guarantee shall, in the event of my death, bind and charge my estate in respect of transactions and dealings subsequent as well as prior thereto, and continue until notice shall be given to you by me, my executors or administrators determining the same."

The testator died on the 4th of November, 1888, and his will, dated the 12th of July, 1888, was proved by the Defendants, the executors, on the 24th of January, 1889.

On the 2nd of August, 1889, the firm of *Spencer Brothers* became bankrupt, and there was then due from them to the Plaintiffs the sum of £4457 14*s.* 9*d.* The Plaintiffs received certain dividends under the bankruptcy of the firm and from the separate estate of *Arthur Spencer*, in respect of collateral securities held by them, amounting in all to £1777 17*s.* 6*d.*, leaving the sum of £2679 17*s.* 3*d.* due to them from the firm.

On the 25th of April, 1890, upon an originating summons taken out by the Plaintiffs, an order was made for the administration of the testator's estate. On the 6th of June, 1890, the Defendants received from the first mortgagees of the property comprised in the mortgage of the 1st of August, 1885, given by *Arthur Spencer* to the testator, the sum of £45 0*s.* 6*d.*, being the balance of the proceeds of sale of the said property after deducting what was due to the first mortgagees on their security; and on the 6th of December, 1890, the Defendants received a dividend amounting to £169 10*s.* 3*d.*, out of the separate estate of

Arthur Spencer, in respect of his covenant to indemnify the testator.

By an agreement of compromise dated the 14th of April, 1891, and made between *Agnes Spencer* and the Defendants, provision was made, subject to the sanction of the Court, for the sale of the property comprised in the equitable mortgage of the 5th of July, 1886, and for the application of the money arising from such sale in or towards the payment of the principal and interest due under the said mortgage.

By an order dated the 30th of April, 1891, this agreement was directed to be carried into effect.

The sale was duly effected, and realized the sum of £250, which was received by the Defendants.

The Plaintiffs claimed to be exclusively entitled to the above mentioned sums of £45 0*s.* 6*d.* and £169 10*s.* 3*d.*, on the ground that they were received by the Defendants in respect of the counter-security given by *Arthur Spencer* to the testator against his liability under the guarantee; and they also claimed, on similar grounds, to be exclusively entitled to the £250 realized by the sale of the property comprised in the equitable mortgage; and, further, that they were entitled to prove against the testator's estate for the balance of their debt.

Hastings, Q.C., and *Curtis Price*, for the Plaintiffs:—

We are entitled to the benefit of the counter-securities given by Mr. and Mrs. *Spencer* to the testator.

We rely upon the proposition laid down in *Mawer* v. *Harrison* (1), and adopted by Sir *W. Grant* in *Wright* v. *Morley* (2), viz., that a bond creditor is entitled to the benefit of all counter-bonds or collateral security given by the principal to the surety.

The right is, of course, confined to the case of the surety being insolvent. As the surety, if he pays the debt, is entitled to the benefit of all securities held by the creditor, so the creditor, if the surety does not pay, is entitled to the benefit of all counter-securities held by the surety.

The principle was also recognised in *The Mayor of Berwick* v.

(1) 1 Eq. C. Ab. 93; Mich. 1692; 20 Vin. Abr. 102, tit. "Surety."
(2) 11 Ves. 12, 22.

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Murray (1), where *Mawer* v. *Harrison* (2) was cited in argument as an authority.

The doctrine established by these cases has never been abrogated or overruled. It is only in the case of the surety being unable to discharge his obligation that the equity arises. Suppose that the executors of *Hugh Walker* had recovered £3000 on the security, it would be manifestly unjust for the estate to take the whole, while the Plaintiffs get only a dividend.

Buckley, Q.C., and *Ingle Joyce*, for the executors:—

The supposed rule has never been followed or acted upon since 1815. We submit that it is contrary to principle. How can the principal creditor be entitled to the counter-security given by way of indemnity? It cannot be by contract, for the contract between the surety and the debtor in no way concerns the creditor.

In *Ex parte Waring* (3) Lord *Eldon* did not treat *Mawer* v. *Harrison* as an authority binding at that time (1815). Sir *Wm. Grant's* words in *Wright* v. *Morley* (4) amount to no more than a *dictum*.

The rule is founded on no principle and has never been enforced. The principal creditor, no doubt, is entitled to prove against the surety's estate, but his utmost right is to fill his pocket as the surety fills his—that is to say, he can prove against the estate of the surety, and if the surety's estate is subsequently increased by the proceeds of the counter-security, he can come in and prove again.

[STIRLING, J:—Do you say that the general estate of the surety ought to have the benefit of the indemnity?]

Yes.

[STIRLING, J.:—Then his estate might actually recover more than he pays?]

No; it is only an indemnity. When the security is realized it is assets of the surety's estate, and as against that the principal

(1) 7 D. M. & G. 497.

(2) 1 Eq. C. Ab. 93; Mich. 1692; 20 Vin. Abr. 102; tit. "Surety."

(3) 19 Ves. 345; 2 Gly. & J. 404; 2 Rose, 182.

(4) 11 Ves. 12, 22.

creditor is entitled to prove. He has no right to the proceeds of the security. The surety cannot, of course, recover more than he has had to pay. As to the security given by Mrs. *Spencer*, she is a third party, and there is no trace of any right in the principal creditor.

R. J. Parker, for the beneficiaries under the will of the testator.

Hastings, in reply:—

It is said that the principal creditor does not get his right to the counter-security by contract. No more does the surety. It rests upon equity. The creditor is entitled to any benefit which the surety may get by his counter-security: *Heritage* v. *Paine* (1). The creditor is entitled to be paid; but he cannot, of course, take the security without giving the surety the benefit of it. The surety has been held entitled even to securities of which he was not aware.

The Lord Chancellor did not express any opinion in *Ex parte Waring* (2) against the rule. It is true he did not express approval of it; but against that must be set off the *dictum* in *Mayor of Berwick* v. *Murray* (3). There is, no doubt, the absence of approval by Lord *Eldon*; but we rely on the expression of Sir *W. Grant* in *Wright* v. *Morley* (4), who said that it was a settled doctrine. The authority has not been so overruled that it ought not to be followed. The security given by Mrs. *Spencer* is on the same footing.

Jan. 14. STIRLING, J. (stated the facts, and continued):—

The Plaintiffs' contention was founded upon two cases: the first is an old case of *Mawer* v. *Harrison* (5). It is reported very shortly as follows: "A bond creditor shall in the Court of Chancery have the benefit of all counter-bonds or collateral security given by the principal to the surety; as if *A.* owes *B.* money, and he and *C.* are bound for it, and *A.* gives *C.* a mortgage or bond to indemnify him, *B.* shall have the benefit of it to recover

(1) 2 Ch. D. 594.
(2) 19 Ves. 345; 2 Gly. & J. 404; 2 Rose, 182.
(3) 7 D. M. & G. 497.
(4) 11 Ves. 12, 22.
(5) *Sub-nom. Maure* v. *Harrison*, 1 Eq. C. Ab. 93; 20 Vin. Abr. 102, tit. "Surety."

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his debt." That case was decided in Michaelmas, 1692. The Plaintiffs also relied upon a *dictum* of Sir *William Grant*, in *Wright* v. *Morley* (1), which runs thus: "I conceive, that, as the creditor is entitled to the benefit of all the securities the principal debtor has given to his surety, the surety has full as good an equity to the benefit of all the securities the principal gives to the creditor." As to the latter portion of the sentence, there is no question at all. It is well established at this date that the surety on paying the debt is entitled to stand in the place of the principal creditor, and to have the benefit of all the securities which the principal creditor had. Now, these two cases were very much discussed in the well-known case of *Ex parte Waring* (2), before Lord *Eldon*. That case is most fully reported perhaps in *Glyn & Jameson's* Reports. It appears from that report that in the course of the argument Lord *Eldon* spoke somewhat disparagingly of the case of *Mawer* v. *Harrison* (3). He said this: "I have never heard this case relied upon as a governing case at this day." In the judgment as reported he puts it thus (4): "The prayer of the first of these petitions has been supported upon this ground, that the short bills and the mortgage . . . having been placed with *Brickwood & Co.* as a security against their acceptances, the holders of these bills have an equity to have that security applied specifically to the discharge of those acceptances, upon the general ground, that upon a transaction of this kind, a person holding the bills, which are the subject of indemnity, has a right to the benefit of the contract between the principal debtor and the party indemnified; and, though not himself a party to that contract, to say, that he, who has contracted for the payment of certain debts out of those pledges, is liable in equity to the demand upon the part of those, whose demands are to be so paid, for that application; and a case was cited (*Mawer* v. *Harrison*) which goes that length. With regard to that case, or cases in general, I desire it to be understood, that I forbear to give any opinion upon that point." Then he goes on to say that he decides, not on that principle but on another ground. The

(1) 11 Ves. 22.

(2) 2 Rose, 182; 2 Gly. & J. 404; 19 Ves. 345.

(3) 1 Eq. C. Ab. 93; Mich. 1692; 20 Vin. Abr. 102; tit. "Surety."

(4) 19 Ves. 348.

result of these two cases—namely, the *dictum* of Sir *William Grant*, in *Wright* v. *Morley* (1), and the judgment and observations of Lord *Eldon* in *Ex parte Waring* (2)—seems to me to be that Sir *William Grant* and Lord *Eldon* were not of the same mind on the point. Under these circumstances, I was very anxious to discover what was really done in the case of *Mawer* v. *Harrison*, which is so shortly reported in 1 Equity Cases, Abridged. The Registrar has been kind enough to make search for that case. No decree was drawn up, but the entry of the case has been found in the Registrar's book, and the pleadings have been discovered, and I am indebted to the learned senior Reporter of this Court, Mr. *Knox*, for having made a summary of them for my use, the pleadings themselves being somewhat lengthy; and from them and the notes in the Registrar's book, it is tolerably easy to discover what the case was. The plaintiff was *Thomas Mawer*, the defendants were *William Harrison* and *William Morley*, and *Mary*, his wife. *Thomas Mawer* was the father of the first wife of *William Harrison*, the father of *William Harrison*, the defendant. By that first marriage *William Harrison*, the father, had three children—namely, *William*, the defendant, *Thomas*, and *Margaret*. The first wife having died, *William Harrison*, the father, married his second wife, *Mary*, the defendant, afterwards the wife of *William Morley*, and subsequently he died intestate, leaving this widow and the three children by the first wife, the persons entitled to his personal estate under the *Statute of Distribution*. Administration was taken out by his widow, and the share of the three children in the intestate's property amounted to £120. It appears that the plaintiff, *Thomas Mawer*, the grandfather of *William Harrison*, the defendant, was very anxious that *William Harrison*, his grandson, should continue the business of a farmer, which had been carried on by *William Harrison*, the father; but for that purpose it was necessary that the sum of £120, which formed the portion of the intestate's estate belonging to the three children, should be paid over to *William Harrison*, the son; and that was accordingly done. The two other children being infants, *Thomas Mawer*, the plaintiff in the action, gave a bond to the defendant,

(1) 11 Ves. 22. (2) 19 Ves. 345; 2 Gly. & J. 404; 2 Rose, 182.

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Mary Morley, the legal personal representative of the intestate, to indemnify her against all claims by those children. It appears that at this time *William Harrison*, the defendant, was an infant, but the money was paid to him. He attained twenty-one, and carried on the farm. Some time after attaining twenty-one he repudiated the transaction, and began to press *William Morley*, and *Mary*, his wife, for payment of his share of his father's estate, which he had already received in point of fact, though apparently an infant. Thereupon *William Morley* gave him a bond for payment of his share, and *William Morley* and *Mary*, his wife, began to sue the plaintiff, *Thomas Mawer*, in the Court of Exchequer for payment under the bond which had been given by him. Thereupon the plaintiff instituted this suit in Equity to restrain the action, and to obtain delivery up of the bond which had been given by him. Now, of the other children who were interested in the intestate's estate, *Thomas* had died an infant and intestate, and *Margaret* was still an infant, and was not a party to the suit. The argument is stated in the Registrar's book. It is to be observed that the bill is by the person who gave the bond, to be relieved of it, and the result is thus stated in the Registrar's book: "The Court doth declare that the defendant, *William*, is well paid, and he must deliver up the bond to the other defendant and give a release and decree the same accordingly." The bond there mentioned is, as I read it, that which had been given by *William Morley* to the defendant, *William Harrison*, for payment of his share. Whether that relief, being relief between co-defendants, ought to have been given by the decree may be a question. Then it goes on: "Stay all proceedings at law on the plaintiff's £100 bond"—that is a mistake for £120, as clearly appears from the previous passage in the Registrar's note, where it is corrected in the margin, but the correction is omitted here—so that all proceedings on the plaintiff's bond were stayed—"till *Margaret* doth release, and when the plaintiff hath procured *Margaret*, who is not a party to the action, to release that bond, then that bond to be delivered up"—and so forth—"but then the plaintiff's bond to be at suit for the recovery of *Margaret's* moiety

of £120" (1). So that all that was decided in that action was this: that the plaintiff, who had given his bond of indemnity, was not entitled to have it delivered up to be cancelled till all claims had been settled. Under those circumstances, it appears that the point for which it was cited in 1 Equity Cases, Abridged, could not have been decided in that case; and that at most the reported statement amounts to a *dictum* in the course of the argument. It is now nearly 200 years since this case was decided, and the sole authorities on a point which must have been of frequent occurrence are these: a *dictum* in 1692, a *dictum* early in the century by Sir *William Grant* in the year 1805, and what appears to me to be the contrary opinion of Lord *Eldon* a little later.

Under these circumstances, it seems to me that there is no real authority for the proposition in question; and upon principle, I cannot see why a surety who takes from the principal debtor a bond or indemnity at once becomes a trustee of that for the principal creditor. That is really the contention of the Plaintiffs. Of course, the other doctrine is well established—viz., that the surety who pays the debt is entitled to stand in the place of the principal creditor; but the doctrine contended for by the Plaintiffs rests entirely on those *dicta* which I have mentioned.

It seems to me, under these circumstances, that I cannot give effect to the contention of the Plaintiffs, and that they must simply be left to prove against the estate of the testator for what is due to them, without having the exclusive benefit of these securities in respect of which payments have been made to the estate.

Solicitors: *Pilgrim & Phillips; Few & Co.*, agents for *John James, Wirksworth.*

(1) The decree was dated the 7th of November, 1692, and the Court consisted of two Lords Commissioners, viz., Sir *James Astry* and Dr. *Edisbury*. These learned Commissioners were both Masters in Chancery; *James Astry* having been appointed on the 27th of April, 1683, and *John Edisbury* on the 13th of May, 1684: see *Hadyn's* Book of Dignities, p. 240.

G. A. S.

STIRLING, J.

1892
Jan 28;
Feb. 5

AMERICAN TOBACCO COMPANY *v.* GUEST.

[1892 A. 101.]

Trade Mark—Infringement—Innocent Purchaser of small quantity of spurious Goods—Costs of Action.

Where a retail trader innocently purchases and deals with a small quantity of goods which turn out to be an infringement of a trade-mark, the Court will not as a matter of course order him to pay the costs of an action for infringement of such trade-mark.

Upmann v. *Forester* (1) distinguished.

MOTION.

The Plaintiffs were the registered proprietors of a trade-mark, No. 27,964, in Class 45, in respect of cigarettes known as "*Chancellor Cigarettes*," which they and their predecessors had manufactured and sold since 1883. They alleged that the Defendants had bought and sold cigarettes which, both as to their manufacture and the get up of the boxes and labels, were a fraudulent imitation of the "*Chancellor Cigarettes*," and they brought an action, and now moved for an injunction, to restrain the Defendants from infringing their trade-mark. The Plaintiffs' manager deposed that they had discovered that a fraudulent imitation of the Plaintiffs' boxes and labels had been made, and that there were on the market various packets of cigarettes, the labels on which, and the boxes in which the same were enclosed, were such a close imitation of the Plaintiffs' boxes and labels as to amount to an absolute forgery; and further, that it would be very difficult for any ordinary buyer of "*Chancellor*" cigarettes to tell whether the same were genuine or not.

The Defendants, who were wine and cigar merchants, had for some time previous to this action bought "*Chancellor*" cigarettes from the Plaintiffs, the last purchase being fifty packets (500 cigarettes) at the price of 17*s.* 6*d.* On the 9th of January, 1892, they purchased a similar quantity at the same price from another firm, Messrs. *Edwards & Co.*

They alleged that they were not aware that the cigarettes so

(1) 24 Ch. D. 231.

purchased from *Edwards & Co.* were not genuine, or that they were an infringement of the Plaintiffs' trade-mark.

On the 26th of January, the Defendants were served with the writ in this action without any previous letter or communication from the Plaintiffs or their solicitors.

Immediately after the service of the writ, the Defendants returned to *Edwards & Co.* 370 (thirty-seven packets) of the cigarettes purchased from them, eleven packets having been previously purchased from the Defendants by the agent of the Plaintiffs. They thus had only two packets (twenty cigarettes) remaining in their possession when the motion came on for hearing, and these, together with the boxes, they at once handed over to the Plaintiffs.

The motion first came on for hearing on the 28th of January.

On the 27th of January, the Defendants' solicitors wrote to the Plaintiffs as follows: "We beg to give you notice that we are instructed on behalf of the Defendants, and we have instructed counsel to oppose your motion to-morrow."

Upon the motion coming on on the 28th of January, the Plaintiffs had not filed any evidence, and were not in a position to move. The Defendants had filed an affidavit, in which they said they were willing to abide by any order which the Court might make; but they submitted that under the circumstances they should not be ordered to pay the costs.

The motion stood over for the Plaintiffs to file their evidence, and came on again on the 5th of February, and by consent the hearing was treated as the trial of the action.

Willis Bund, for the Plaintiffs:—

The Defendants are wrongdoers, and we are entitled to the costs of the action: *Cooper* v. *Whittingham* (1); *Upmann* v. *Forester* (2).

Oswald, for the Defendants:—

This action ought not to have been brought in the High Court. The Plaintiffs ought to pay the costs, or, at any rate, they ought not to have any.

(1) 15 Ch. D. 501. (2) 24 Ch. D. 231.

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It is part of the Plaintiffs' case that the imitation is so close as to render it almost impossible to tell the spurious goods from the real. In *Westbury-on-Severn Rural Sanitary Authority* v. *Meredith* (1), it was held that the old rule of the Court of Chancery, where the subject-matter, is below £10 in value, still remains in force. This action was not brought to establish any general right, and the old rule of the Court, therefore, still applies notwithstanding the *Judicature Act.*

The Plaintiffs were not in any way misled by the letter of the 27th of January.

With regard to the authorities which have been cited, in *Upmann* v. *Forester* (2), the quantity of goods was very large; while here the transaction complained of is the sale of 500 cigarettes valued only at 17*s.* 6*d.*; and Mr. Justice *Chitty* in his judgment expressly reserved the case of an innocent buyer of a small parcel of spurious goods; and in *Wittman* v. *Oppenheim* (3), in which *Upmann* v. *Forester* was followed, Mr. Justice *Pearson* very reluctantly ordered the defendant to pay costs. I admit that the Plaintiffs were not bound to give any notice before action; but in such a case as this they must take the consequences of rushing into litigation in the High Court over so small a matter, and ought, at any rate, not to have any costs.

Bund, in reply:—

The Defendant nowhere says that this was the only parcel of spurious goods which he ever had in his possession.

STIRLING, J. (stated the facts, and continued):—

I think that this is not the kind of action which ought to be encouraged. If the owner of a trade-mark finds that it is being pirated, surely it is not the small retailer who ought to be punished; but an endeavour ought to be made to prosecute those who place the spurious goods upon the market; and although I agree that the Plaintiffs are entitled to an injunction, yet I cannot think it is the duty of the Court in every case in which a small retail dealer who has innocently (and I think that the

(1) 30 Ch. D. 387. (2) 24 Ch. D. 231.
(3) 27 Ch. D. 260.

Defendants in this case have acted innocently) happened to purchase a small quantity of the spurious goods, to say that he ought to be fixed with the costs of the action. There is no authority to that effect. I entirely agree with the judgment in *Upmann* v. *Forester* (1), but there Mr. Justice *Chitty* says this (2): "The result of my decision will not be, as the defendant has suggested, that every purchaser of a small parcel of spurious goods incurs a liability to pay the costs of an action in the Chancery Division for infringing a patent or trade-mark. I cannot pass over the fact that there is in the present case a large consignment of goods —5000 cigars." In that case, there being that large amount of goods, Mr. Justice *Chitty* made an order for payment of the costs. Here the transaction complained of relates only to 500 cigarettes valued at 17*s.* 6*d.*; and I think that under these circumstances I am justified in excepting, as I think Mr. Justice *Chitty* would have excepted, this case from the operation of the rule which was laid down by him in *Upmann* v. *Forester*, and in saying that there ought to be no costs.

Solicitors for Plaintiffs: *Paddison, Son, & Fullilove.*
Solicitors for Defendants: *Finch & Turner.*

G. A. S.

PINI *v.* RONCORONI.

STIRLING, J.
1892
Feb. 5.

[1892 P. 118.]

Practice — Partnership — Dissolution — Receiver and Manager — Arbitration Clause—Stay of Proceedings—Jurisdiction—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

The mere fact of dissolution of a partnership does not give one partner an absolute right, as against his co-partners, to have a receiver appointed of the partnership business.

Articles of partnership entered into by the Plaintiff and Defendant provided that all doubts, difficulties, or divergencies that might arise between the partners during the course of the partnership, or at its liquidation or its total or partial dissolution, should be resolved and adjusted by friendly arbitration. The term of the partnership had expired, and it was continued at will. The Plaintiff brought an action for dissolution, and moved for the

(1) 24 Ch. D. 231. (2) 24 Ch. D. 236

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appointment of a receiver and manager. The Defendant moved for a stay of proceedings under sect. 4 of the *Arbitration Act*, 1889:—

Held, that the Court had jurisdiction while appointing a receiver to stay all proceedings in the action except for the purpose of carrying out the order for a receiver.

Compagnie du Sénégal v. *Woods* (1) followed.

THIS was an action for the dissolution of the partnership subsisting between the Plaintiff and the Defendants, *Roncoroni* and *Bonacina*. The partnership business was carried on in *London* and *Buenos Ayres*. The Plaintiff resided at *Buenos Ayres* and managed that branch of the business, while the Defendant *Bonacina* managed the *London* branch. The Defendant *Roncoroni* took no active part in the business.

The articles were dated the 18th of August, 1887, and provided that "All the doubts, difficulties, or divergencies that may arise between the partners, their heirs or representatives, during the course of this society, or at its liquidation or its total or partial dissolution, shall be resolved and adjusted by friendly arbitration . . . and the decision or decisions that may be pronounced shall be observed and respected by the interested parties, without any recourse of appeal to the ordinary Courts of Justice, it being the firm will of the partners to abstain from ordinary law."

The time fixed by the articles for the duration of the partnership having expired, the partnership was continued as a partnership at will. On the 30th of June, 1890, the shares of the partners in the capital of the business stood as follows: The Plaintiff was entitled to £13,686 15*s.* 10*d.*, the Defendant *Roncoroni* to £5665 11*s.* 1*d.*, and the Defendant *Bonacina* to £30,877 8*s.* 3*d.* Between June, 1890, and August, 1891, the Defendant *Bonacina* was engaged in transactions on the *Stock Exchange*, and incurred heavy losses, in order to meet which he drew out from the *London* business sums exceeding in amount the total of his capital as it stood on the 30th of June, 1890. In consequence of this, in August, 1891, the firm was obliged to call a meeting of its *London* creditors, before whom a statement of affairs was laid, from which it appeared that the debts ex-

(1) W. N. (1883) 180; 53 L. J. (Ch.) 166.

ceeded the assets by a considerable amount. The Plaintiff thereupon came to *London* and commenced this action for dissolution of the partnership.

He now moved for the appointment of a receiver of the partnership business. The Defendant *Bonacina* applied, by way of cross-motion, that pursuant to the 4th section of the *Arbitration Act*, 1889, all proceedings in the action might be stayed, the parties having agreed that the matters in difference should be referred to arbitration.

Hastings, Q.C., and *G. F. Hart*, for the Defendant *Bonacina*:—

This is a proper case for arbitration. The questions at issue between the parties are precisely such as were contemplated by the deed. They can all be determined in the arbitration. We wish to avoid the expense of taking the partnership accounts in Court.

Maidlow, for the Plaintiff:—

The arbitration clause cannot override the Plaintiff's right to the appointment of a receiver. The question whether the partnership should be dissolved or not is not one which can be referred to arbitration under the clause: *Joplin* v. *Postlethwaite* (1) and *Turnell* v. *Sanderson* (2).

The partnership being dissolved, the Plaintiff is entitled as a matter of right to have a receiver appointed to protect the partnership assets: *Lindley* on Partnership (3); *Thomson* v. *Anderson* (4). The Defendant having drawn out the whole of his capital, the Plaintiff has an absolute right to a receiver. A receiver cannot be appointed in the arbitration.

[STIRLING, J.:—There are cases on the appointment of a receiver having regard to the *Common Law Procedure Act*.]

Yes: *Willesford* v. *Watson* (5) is one of them, where it was held that the subject-matter of the suit was within the clause; but I am not putting it in that way; I submit that the Plaintiff is not deprived of his right to a receiver.

(1) 61 L. T. (N.S.) 629.
(2) 60 L. J. (Ch.) 703.
(3) 5th Ed. pp. 547, 548.
(4) Law Rep. 9 Eq. 523, 533.
(5) Law Rep. 8 Ch. 473.

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[STIRLING, J.:—The arbitrators might decide who should have the conduct of the winding-up.]

That would be practically appointing a receiver, and the arbitrators cannot do that: *Lingood* v. *Eade* (1). The arbitrators would have no control over the debtors, who might pay their debts to either partner.

[STIRLING, J.:—In *Harding* v. *Glover* (2) Lord *Eldon* disavowed the principle that a receiver was to be appointed merely on the ground of dissolution of a partnership.]

Yes; but he lays down, that when a breach of duty has been committed by a partner that is a ground for it. Here *Bonacina* has clearly committed such a breach. I am willing that the accounts should be taken by the arbitrator, but insist on my right to the appointment of a receiver.

[He also referred to *In re Mackay* (3).]

Hastings, in reply:—

The right to a receiver upon the dissolution of a partnership is not absolute. The cases cited do not apply, because here there is no question as to dissolution, the partnership being dissolved by the issue of the writ.

The language of the clause is very wide, and contemplates the liquidation of the partnership as the subject of arbitration.

In *Willesford* v. *Watson* (4), Lord *Selborne* said (5): "It is said that the arbitrator could not grant an injunction. No doubt he could not grant an injunction; but he might say that the thing was not to be done, and there being liberty to apply to this Court, this Court would then grant the injunction." Substitute the appointment of a receiver for the granting of an injunction, and that applies to this case.

[STIRLING, J.:—In *Compagnie du Sénégal* v. *Woods* (6), *Kay*, J., appointed a receiver, and stayed all further proceedings with a view to the questions at issue being determined by arbitration.]

(1) 2 Atk. 501.
(2) 18 Ves. 281.
(3) 2 Ad. & E. 356.
(4) Law Rep. 8 Ch. 473.
(5) Ibid. 8 Ch. 480.
(6) 53 L. J. (Ch.) 166.

There is no question as to the jurisdiction of the Court to appoint a receiver when the assets are in danger; but no case of that sort is made out here. This is a case which may properly be left to arbitration, liberty to apply being of course reserved.

STIRLING, J. (after stating the facts, continued):—

The arbitration clause in the articles of partnership is undoubtedly very wide—indeed, as wide as it could well be; and it is really not disputed that, so far as the Defendants' motion is concerned, an order ought to be made upon it that all matters in dispute in the winding up of the partnership which has been determined, it being a partnership at will, should be determined by arbitration. That would include all questions as to the taking of the accounts, and as to the best mode of realizing the assets or the division of them in specie. The Plaintiff, however, insists that he is entitled as of right to the appointment of a receiver, and contends that the mere fact of the dissolution gives him that right. That is putting it rather higher than it is put in *Lindley* on Partnership (1), where it is said, and I adopt the statement, that where one partner seeks to have a receiver appointed against his co-partners, "if the partnership is already dissolved," as it has been, "the Court usually appoints a receiver, almost as a matter of course." Now, what cause is shewn here for the appointment of a receiver? It is a fact that the Defendant *Bonacina* has withdrawn from the partnership funds a very large sum, and has so brought about its insolvency. That is a good ground for saying that the Plaintiff can no longer trust him. I further think that the jurisdiction of the Court to appoint a receiver is not ousted by the arbitration clause. That was carefully considered and decided by Mr. Justice *Kay* in *Compagnie du Sénégal* v. *Woods* (2). I entirely agree, if I may say so, with the reasons and conclusions of the learned Judge. Is this a case in which a receiver ought to be appointed? I think, under the circumstances, that the Plaintiff is entitled to have a receiver appointed; but I desire to disturb the situation as little as possible. It is obvious that the Defendant *Bonacina* has a peculiar interest in the *London* business. He has managed

(1) 5th Ed. p. 547. (2) W. N. (1883) 180; 53 L. J. (Ch.) 166.

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it, and it has been chiefly made by his exertions. On the other hand, the Plaintiff is more largely interested in the *Buenos Ayres* business; and *Bonacina* wishes, of course upon proper terms, to acquire the *London* business for himself. That is a proper question for the arbitrators to deal with, and I do not wish to interfere with them. It appears to me to be possible, while appointing a receiver, to preserve the *London* business for the Defendant *Bonacina*, if he wishes to purchase it. If I give him leave to propose himself as receiver, it must be upon terms of his giving security, so as to put the Plaintiff in a proper position of security as regards the assets. I think the proper order to make is to refer it to Chambers to appoint a fit and proper person, or fit and proper persons, to be receiver and manager, or receivers and managers of the partnership business. I give liberty to any party to propose himself as such receiver and manager, or as one of such receivers and managers. If the Defendant *Bonacina* proposes himself to be one of the receivers, he must give security for the Plaintiff's protection; but that will not be inserted in the order. I make that order on the Plaintiff's motion. Upon the other motion, I make an order in the same form as the order made by Mr. Justice *Kay* in *Compagnie du Sénégal* v. *Woods* (1), staying all proceedings in the action except for the purpose of carrying out the order for a receiver, with general liberty to apply. There was one order made on both motions in that case, and there will be one order on both motions in this. I make no order as to costs.

Solicitors: *Michael Abrahams, Sons & Co.; Ford, Lloyd, Bartlett, & Michelmore.*

(1) W. N. (1883) 180; 53 L. J. (Ch.) 166.

G. A. S.

In re LONDON, WINDSOR AND GREENWICH HOTELS COMPANY.

QUARTERMAINE'S CASE.

1891
Oct. 27.
1892
Jan. 12; March 4.

Company—Winding-up—Proof—Secured Creditor—Realization of Security—Deficiency—Application of Proceeds in Discharge of Interest subsequent to Winding-up—Right to Prove for Balance—Rule in Bankruptcy—Judicature Act, 1875, *s.* 10 [*Revised Ed. Statutes, vol. xvii., p.* 740]—*Bankruptcy Act,* 1883, *ss.* 9, *sub-s.* 2, 168; *Sched.* 2, *r.* 9—*Bankruptcy Rules,* 1886, *rr.* 73–75.

A secured creditor of a company which is in liquidation, who has exhausted his security without satisfying his debt, is not entitled to apply the proceeds of the security in payment first of interest subsequent to the winding-up, and then in reduction of principal, and to prove in the winding-up for the balance of the principal. His proof must be limited to what was due for principal and interest at the commencement of the winding-up after deducting therefrom proceeds of sale or realization received in respect of the security.

He is entitled, however, to set off profits realized from the security since the winding-up against interest accrued during the same period.

In re Talbott (1), not followed.

Ex parte Penfold (2), followed.

ADJOURNED SUMMONS.

In July, 1866, *Thomas Quartermaine* sold the lease of the *Ship Tavern* at *Greenwich*, of which he was the owner, together with the goodwill of the business carried on there, and the stock of wines, &c., to the *London, Windsor and Greenwich Hotels Company, Limited*, for the sum of £44,185 19*s.* 3*d.*, of which £12,000 was paid in cash, £1250 in shares, and £5000 in debenture bonds, while the balance, amounting to £25,935 19*s.* 3*d.*, was secured by a mortgage of the premises, and was to be paid off by instalments.

Thomas Quartermaine died on the 21st of November, 1867.

On the 1st of July, 1870, there being still due upon the security of the mortgage the sum of £21,248, the company executed to *Quartermaine's* executors, by way of further security, a mortgage of certain other hotels. The instalments of the mortgage money and interest were regularly paid down to July,

(1) 39 Ch. D. 567. (2) 4 De G. & Sm. 282.

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1885; but that which fell due in July, 1886, was not paid, and the company being then in difficulties, the executors commenced an action [1886 Q. 53.] for foreclosure, and obtained the appointment of a receiver and manager of the mortgaged property and the businesses carried on thereupon.

On the 8th of January, 1887, the company went into voluntary liquidation, and by an order dated the 22nd of January, 1887, the voluntary winding-up was continued under the supervision of the Court.

At the commencement of the winding-up there was due upon the securities the sum of £11,248 5*s.* 6*d.* in respect of principal, and £282 5*s.* 2*d.* in respect of interest.

The receiver carried on the businesses, realizing certain profits, and from time to time effected sales of portions of the mortgaged property. These profits and the proceeds of the realization of the securities he periodically paid over to the executors, who applied the sums so received, first in keeping down the interest on the mortgages, and then in reduction of principal. The securities did not realize enough to satisfy the mortgage debt.

In pursuance of an order made in the foreclosure action directing certain accounts and inquiries, the Chief Clerk by his certificate, dated the 18th of April, 1891, found that there was still due upon the security of the mortgage the sum of £8653 13*s.* 10*d.* in respect of principal, interest, and costs. This was a summons taken out by the executors in the winding-up of the company, asking that the liquidator might be ordered to admit them to prove as unsecured creditors for the sum of £8595 2*s.* 1*d.*, being the amount found by the Chief Clerk to be due on the mortgage, less the sum of £58 11*s.* 9*d.*, representing interest accrued between the date of the last receipt by the applicants of any money in respect of their security and the date of the certificate.

The summons was opposed by the liquidator on the ground that the amount of the proof ought to be limited to what was due for principal and interest at the commencement of the winding-up after deducting therefrom all sums which had come to the hands of the mortgagees whether in respect of proceeds of sale or intermediate income.

Buckley, Q.C., and *Abraham*, for the claimants:—

We are entitled to prove in the liquidation for the balance of the principal due: *In re Talbott* (1).

[STIRLING, J.:—In that case Mr. Justice *North* does not appear to have had his attention called to the rule in Bankruptcy: *In re Savin* (2).]

If we had proved at first in the winding-up, that rule would have applied; but we have realized our security, and are now entitled to prove as unsecured creditors for the balance of our debt. Rule 9 of Sched. 2 to the *Bankruptcy Act*, 1883, which regulates proof by secured creditors, does not apply to a creditor who has held a security, but has exhausted it and comes in to prove for the balance of his debt. The question whether a creditor is "secured" or not must be determined at the time when he comes in to prove. *In re Savin* is not conclusive on the point. In all the cases the creditor has come in as a "secured creditor."

[STIRLING, J.:—Sect. 9, sub-sect. 2, of the *Bankruptcy Act*, 1883, shews that a "secured creditor" is a creditor who holds a security for his debt at the date of the bankruptcy.]

Assuming that your Lordship is against us on that point, then we say that we are entitled to set off profits made since the commencement of the winding-up against interest accrued during the same period: *Ex parte Penfold* (3).

Hastings, Q.C., and *Le Breton*, for the liquidator:—

In *In re Talbott*, the learned Judge does not appear to have had his attention drawn to the rules or the authorities.

We rely upon *In re Savin*. The other point is really only putting the question in another way: *Ex parte Penfold* does not apply.

[STIRLING, J.:—There is nothing in the rules which deals with interim profits. *Ex parte Penfold* is treated in *Yate Lee* on Bankruptcy (4) as an authority that interim profits are to be

(1) 39 Ch. D. 567.
(2) Law Rep. 7 Ch. 760.
(3) 4 De G. & Sm. 282.
(4) 3rd Ed. p. 629.

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applied in keeping down interest. See also *Ex parte Bath* (1), which was followed in *In re Fane* (2).]

There must have been peculiar circumstances in *Ex parte Penfold* (3). It is difficult to see why there should be any difference between income and principal.

Buckley, in reply:—

In re Savin (4) is not a decision on this point. The case is covered by *In re Talbott* (5). *Ex parte Penfold* has never been distinguished, doubted, or dissented from.

Jan. 12. STIRLING, J.:—

At the time of the commencement of the winding-up certain hotels belonging to the company were subject to a mortgage vested in the executors of *Thomas Quartermaine*. These executors brought and duly prosecuted an action to enforce their security. In that action a receiver was appointed. The receiver entered into possession, carried on the businesses, and made profits. Sales were from time to time made of the mortgaged property, and, ultimately, the whole of the property comprised in the security was realized, but a considerable balance still remains due to the mortgagees. They now desire to prove in the winding-up, from which they have hitherto entirely stood aloof; and the question to be decided is for what amount the proof is to be admitted, the company being insolvent. By sect. 10 of the *Judicature Act*, 1875, it is provided that in the winding up of every company whose assets may prove insufficient for the payment of its debts and liabilities and the costs of winding-up, "the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable . . . as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt." Now, the *Bankruptcy Act*, 1883, provides as follows:—Sect. 9, sub-sect. 1: "On the making of a receiving order an Official Receiver shall be thereby constituted

(1) 22 Ch. D. 450.
(2) W. N. (1888) 231.
(3) 4 De G. & Sm. 282.
(4) Law Rep. 7 Ch. 760.
(5) 39 Ch. D. 567.

receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose." Sub-sect. 2: "But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed." In sect. 168, a "secured creditor" is stated to mean "a person holding a mortgage charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor"; and the schedules to the Act are to be construed and have effect as part of the Act. Rule 9 of the 2nd Schedule runs thus: "If a secured creditor realizes his security, he may prove for the balance due to him, after deducting the net amount realised." It was contended that this rule was inapplicable to the present case. It was said that the executors of *Quartermaine*, although secured creditors at the commencement of the winding-up, had realized their security at the time when they came in and proved, and were, therefore, to be treated as unsecured creditors. In my opinion, such a construction of rule 9 in Sched. 2 would be inconsistent with the terms of sect. 9, sub-sect. 2, of the Act. A creditor who has taken the benefit of the provisions in that clause and has realized his security and afterwards comes in to prove, must do so, as I think, on the terms laid down in Sched. 2, rule 9. This view is supported by the case of *Ex parte Penfold* (1), to which I shall presently refer. It is next to be considered how the balance mentioned in that rule is to be ascertained. It was contended on behalf of *Quartermaine's* executors that each sum received by them ought to be treated as applied in payment, first of the interest due at the time of the receipt, and then towards reduction of the principal for the time being due; and that the ultimate balance thus arrived at is the amount for which the proof ought to be admitted. It was further contended that even if the proceeds of sale

(1) 4 De G. & Sm. 282.

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of the property comprised in the security could not be applied in payment of interest subsequent to the commencement of the winding-up, still the income which had come to the hands of the receiver appointed in the action was so applicable. On behalf of the liquidator it was contended, on the other hand, that the amount of the proof ought to be limited to what was due for principal and interest at the commencement of the winding-up after deducting therefrom everything coming to the hands of the mortgagees, whether in respect of proceeds of sale or intermediate income.

For the purpose of deciding between these contentions it is necessary to consider some of the cases which have been decided in Bankruptcy. The question appears to have first arisen under Lord *Loughborough's* order of the 8th of March, 1794 (1). Under that order, if any persons claimed to be mortgagees of any part of the bankrupt's estate, the Commissioners were to inquire whether such persons were mortgagees; and if it appeared that they were mortgagees, the Commissioners were to take an account of the moneys due, and then direct a sale of the property. The moneys to arise from the sale were to be applied first in payment of the expenses attending such sale, and then in payment and satisfaction of what should be found due to such mortgagee or mortgagees for principal, interest, and costs; and the rule proceeds: "But in case the moneys to arise from such sale shall be insufficient to pay and satisfy what shall be so found due to such mortgagee or mortgagees, I do order that such mortgagee or mortgagees be admitted a creditor or creditors under such Commission for such deficiency, and to receive a dividend or dividends thereon out of the bankrupt's estate or effects," and so on. That rule was made in 1794, and has been substantially repeated in all Bankruptcy Rules down to the present time, and with some slight modifications is identical with the provisions to be found in rules 73–75 of the General Rules under the *Bankruptcy Act*, 1883, now in force. Rule 75 says: "The moneys to arise from such sale shall be applied in the first place in payment of the costs, charges, and expenses of the trustee, of and occasioned by the application to the Court, and of such sale and attendance thereat,

(1) 2 *Cooke's* Bankrupt Laws (8th ed.), pp. 266, 270.

and in the next place in payment and satisfaction, so far as the same shall extend, of what shall be found due to such mortgagee, for principal, interest, and costs, and the surplus of the said moneys (if any) shall then be paid to the trustee. But in case the moneys to arise from such sale shall be insufficient to pay and satisfy what shall be so found due to such mortgagee, then he shall be entitled to prove as a creditor for such deficiency, and receive dividends thereon rateably with the other creditors, but so as not to disturb any dividend then already declared." These rules do not provide how the deficiency is to be ascertained; but the effect of Lord *Loughborough's* order was considered in *Ex parte Badger* (1). There the petitioners were creditors in respect of two mortgages from the bankrupt. An account was taken, and the property sold, and the petitioners claimed to prove for the deficiency. This was resisted on the ground that they were not entitled to charge interest beyond the date of the Commission. The case was argued, and the Lord Chancellor said: "It must be according to the course of the Court in other cases, where the mortgage is deficient"; and the petition was dismissed without costs. That, therefore, was a decision that the petitioners, the creditors in that case, were not entitled to charge interest after the date of the Commission. The order in that case is not given, and it is not shewn exactly how the rights of the parties were worked out; but in 1826 a case occurred in which there is an elaborate order by Lord *Eldon* in a case very similar to the present, except that there the proceedings were under Lord *Loughborough's* rule. The order is to be found in *Ex parte Ramsbottom* (2). In that case a petition was presented that a security might be sold in the bankruptcy, and an issue was ordered by the Vice-Chancellor as to the validity and amount of the debt. On the 16th of March, 1826, Lord *Eldon*, on appeal, referred it to the Commissioners to take an account of the several sums of money received by the mortgagee in respect of his securities, and it was directed in the taking of the said accounts that the principal moneys which should have been so received should from time to time be applied in payment and reduction of the principal, and that the mortgagee should

(1) 4 Ves. 165. (2) 2 Mont. & A. 79.

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be allowed to deduct, receive, and retain the rents and issues and annual profits which from and since the date of the commission of bankruptcy up to the date of the order should have arisen or accrued due in respect of the said several securities as and in or towards payment of the dividends on the mortgaged stock prior to the bankruptcy, and the interest subsequent to the date of the commission of bankruptcy; and in case the rents and profits accrued subsequent to the date of the Commission should be more than sufficient for the payment of interest, then the surplus was to be applied in reduction of the principal. So that in substance the proceeds of sale were applied in reduction of the principal, the accruing income in satisfaction of the interest for the time being due subsequent to the date of the bankruptcy, and the surplus income in reduction of the principal. That order only extended till the 16th of March, 1826, the date of the order, which related exclusively to dealings before that. Afterwards a question arose—and it is to this that the report relates—whether the same rule applied to interest subsequent to that order. It was held by the Court of Review that the principle of Lord *Eldon's* order must be applied down to the time when the whole matter was wound up.

The next case is *Ex parte Penfold* (1). There the mortgagees, having instituted a suit to enforce their security, and having had the property realized in that suit, came in for the first time in the bankruptcy and sought to prove for the balance, and the question was upon what terms their proof was to be admitted. It was held by the Commissioner, and on appeal by the Vice-Chancellor, that Lord *Eldon's* order in *Ex parte Ramsbottom* (2) must be followed. The Vice-Chancellor said (3): "If I am to be guided by Lord *Eldon's* order in *Ramsbottom's Case* there is nothing to discuss, for that case closely resembles this, and the point has been settled by a Lord Chancellor of the highest authority. It has been suggested, however, that the order was taken by consent. There is nothing on the records of the Court to denote this, and I see no good reason to infer that it was so. Independently, however, of that decision, I think the petitioners right

(1) 4 De G. & Sm. 282. (2) 2 Mont. & A. 79.
(3) 4 De G. & Sm. 283.

on principle." That is the judgment, and it is to be observed that that was a case of mortgagees instituting a suit to realize their security and then coming into the bankruptcy after the property had been entirely realized, just as has been done here. I have obtained from the Bankruptcy Records a copy of the order which was made in that case. It is as follows:—

In Bkcy. *In re* BARKER. Wednesday, 23 April, '51.
Ex parte PENFOLD.

WHEREAS *William Margesson Penfold*, of , and *Anna Maria*, his wife, and *E. E. Black*, widow, and *Catherine E. Barker*, spinster, both of , did on the 13th of January last prefer, &c., praying that this Court would be pleased to declare that the said petitioners were entitled to apply the rents, interest, and profits mentioned in the said petition accrued due since the fiat issued against the said bankrupt in reduction of subsequent interest, and that they might be admitted to prove for the whole sums which would remain due to them in respect of principal and interest down to the date of the said fiat after giving credit for the proceeds of the securities exclusive of such profit made since the date of the said fiat. Now upon hearing, &c.,

This Court doth declare that the amount of principal and interest due to the said petitioners at the date of the issuing of the fiat in Bankruptcy awarded and issued against the said defendants must first be ascertained, and then that the gross amount of the principal purchase-moneys produced by the sales of the mortgaged premises in the said petition mentioned without regard to the investments of such purchase-moneys in stock or to the proceeds of such stock, when sold, is to be deducted therefrom, and it is ordered that the said petitioners be at liberty to go before the Commissioner of Her Majesty's Court of Bankruptcy acting in the prosecution of the said fiat, and prove for the balance after giving credit for what (if anything) shall appear to have been received by them the said petitioners in respect of income in excess of the interest subsequent to the issuing of the said fiat, on taking an account of the interest accrued due on the mortgage debt from the date of the said fiat down to the 10th day of August, 1850, on the one hand, and of the rents of the estates comprised in the security, the interest on unpaid purchase-moneys of such estates, and the dividends on the invested purchase-moneys of such estates from the date of the said fiat down to the 10th day of August, 1850, on the other hand: And it is ordered that the said petitioners be at liberty to retain out of such rents, interest, and dividends so far as the same will extend the full amount of interest accrued due on their mortgage debt subsequent to the said fiat: And it is hereby ordered that the said costs of all parties of and occasioned by this application be paid out of the estate of the said bankrupt: And it is hereby referred to the said Commissioner or to the Master of the Court of Bankruptcy to tax such costs.

The last case to which I need refer is *In re Savin* (1). It is unnecessary that I should state the facts, as the case is valuable

(1) Law Rep. 7 Ch. 760, 762.

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only as a statement of law on the subject. In the Court below, the learned Judge laid down the law in this way: "That does not touch the principle which, as I think, must govern this and all other cases in bankruptcy: the mortgagee is entitled to be paid his principal, interest, and costs out of his security, and then to prove against the estate for the deficiency, not of that aggregate amount, but of the deficiency in his capital debt." That came before the Court of Appeal, and the judgment of *James*, L.J., appears to me entirely to negative the principle on which the learned Judge in the Court below had acted. He says this (1): "There is a general rule in bankruptcy—whether a right and a reasonable rule or not—that there is to be no proof in bankruptcy for interest subsequent to the bankruptcy. There was also a rule in bankruptcy, that a creditor holding a mortgage security is to make up his mind whether he will rely upon his security or give it up and come in and prove with the other creditors. This rule was relaxed in favour of the creditor by a rule that his security might be sold, and then he was to apply the realised proceeds in payment of his debt. On this rule a judicial decision was made nearly eighty years ago, that the proceeds of the sale were, in case of deficiency, to be applied in payment of principal and interest up to the date of the bankruptcy and up to the date of the bankruptcy only; and then the creditor was to prove for the residue of his debt, which, of course, did not include any interest subsequent to the date of the bankruptcy." He confines that statement to the proceeds of sale; and then he goes on: "That rule has been repeated in the very same terms by every writer on the subject, and by every Judge, with the exception perhaps of Mr. Commissioner *Montagu's* note to *Ex parte Ramsbottom* (2). It seems to have been considered as the established rule in bankruptcy, and so it was laid down by Lord *Westbury* in the case already referred to. That being so, it appears to me that we cannot go into any reasoning whether the rule is unjust or unreasonable, or alter the rule, or say that the rule is only to be applied in the same cases in which it has been applied, or that the rule is not quite consistent with the existing state of circumstances."

(1) Law Rep. 7 Ch. 764. (2) 2 Mont. & A. 83, App. A.

Then he considers the particular facts of the case before him and applies the rule to them. That is a judgment of the Court of Appeal which distinctly deals with the application of the proceeds of sale of a realized security, and it seems to me to be a distinct authority that the proceeds of sale cannot be applied in payment of interest subsequent to the commencement of the winding-up, as contended for by the mortgagees. In argument on their behalf, reliance was placed on *In re Talbott* (1), decided by Mr. Justice *North* in 1888. Unfortunately in that case *In re Savin* (2) was not cited; and I am authorized by the learned Judge to say that if his attention had been called to that decision of the Court of Appeal his own would have been different. I am of opinion, therefore, that the proceeds of sale are not applicable to payment of interest accrued subsequently to the commencement of the winding-up. As regards the application of the income, I confess that if the matter were *res integra*, I should have had some difficulty in holding that there was any difference between that and the proceeds of sale; but it appears to me that I am bound by the decisions in *Ex parte Ramsbottom* (3) and *Ex parte Penfold* (4). Both cases were cited in *In re Savin*, and no doubt was cast upon them. I have made a careful search, and cannot find that the rule there laid down has ever been overruled. I have ascertained by communication with the learned Senior Registrar of the Court of Bankruptcy that these cases are still treated as authorities, and have been at no very distant date acted upon by the Registrars. He has referred me to a case heard in 1888, in which the rule was accepted without question. It seems to me, therefore, that *Quartermaine's* executors must be admitted to proof on terms similar to those contained in the order in *Ex parte Penfold*. I have obtained a copy of the order made in that case, which I will hand down to the Registrar, and I think it will be found, if any further question arises, that that order covers the whole case. The liquidator will take his costs out of the estate.

March 4. On this date, the order having been drawn up in

(1) 39 Ch. D. 567.
(2) Law Rep. 7 Ch. 760.
(3) 2 Mont. & A. 79.
(4) 4 De G. & Sm. 282.

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accordance with the order in *Ex parte Penfold* (1), the matter was again mentioned to the Court.

Buckley, Q.C., and *Abraham*, for the claimants:—

The order as drawn up does not give the mortgagees their costs of the action to enforce their security. In *Ex parte Penfold* the mortgagees' costs had been disposed of previously, and accordingly no provision was made for them in the subsequent order. We submit that we are entitled to the costs of enforcing our security: *Ex parte Carr* (2).

Hastings, Q.C., and *Le Breton*, for the liquidator:—

The only question on the summons was as to the right to prove for interest subsequent to the winding-up. No doubt the order is not right as it stands. There ought to have been two declarations, and the proof should have been sent back to Chambers.

STIRLING, J., made the following order:—

This Court doth declare that for the purpose of ascertaining the amount for which the Applicants are entitled to be admitted to prove as unsecured creditors of the above-named company no portion of the proceeds of sale or realization of the Applicants' securities can properly be appropriated to the discharge of interest accrued after the 8th of January, 1887, being the date of the commencement of the winding-up of the company, but that any sums representing profits realized by the receivers and managers from the carrying on of the business of the Ship Tavern, and also any sum representing interest, dividends, or income arising from any investments of the proceeds of sale or realization of any of the Applicants' said securities may be properly so appropriated and retained by the Applicants.

And this Court doth declare that the Applicants are entitled to be admitted to prove as unsecured creditors of the company for a sum representing the full amount of principal and interest due to the Applicants upon their securities on the 8th of January, 1887, and the costs of the Applicants as Plaintiffs in the action *Quartermaine* v. *London, Windsor, and Greenwich Hotels Company, Limited* [1886 Q. 53], and the costs, charges, and expenses properly incurred by the Applicants, or the late Plaintiffs as mortgagees, after deducting therefrom the gross amount arising from the sale or realization of the Applicants' securities without regard to the investments of the amount so arising or to the proceeds of such investments when realized: And it is ordered that it be referred to the Taxing Master to tax the costs of the Applicants and of the liquidator of the said application in Chambers and occasioned by the adjournment

(1) 4 De G. & Sm. 282. (2) 11 Ch. D. 62.

thereof into Court: And it is ordered that the costs of the Applicants be added to their said debt, and the costs of the liquidator be paid out of the assets of the company: And it is ordered that it be referred to Chambers to ascertain the amount for which, upon the footing of the above declarations, the Applicants are entitled to be admitted to prove as unsecured creditors of the company: And it is ordered that they be admitted to prove accordingly for the amount to be certified: And any of the parties are to be at liberty to apply as they may be advised.

Solicitors: *Lawrance, Waldron, & Webster; Lumley & Lumley.*

G. A. S.

KEKEWICH, J.

1892

Feb. 3.

In re CROFT.
DEANE *v.* CROFT.

[1891 C. 4408.]

Voluntary Settlement—Appointment—Death of Settlor—Succession—Stamps—Account Stamp Duty—Specific Appointees—Residuary Appointee—Incidence of Duty—Customs and Inland Revenue Act, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-s.* 2, (*c*)—*Customs and Inland Revenue Act,* 1889 (52 & 53 *Vict. c.* 7), *s.* 11.

C. being, under a voluntary settlement made by him, tenant for life of certain trust funds, with remainder to his children as he should by will appoint, died in 1891, having by his will appointed part of the trust funds in separate specific sums to four of his five children, and the residue to his fifth child. The will contained no direction that the specifically appointed sums should be paid free of duty:—

Held, that the account duty payable in respect of the trust funds on *C.'s* death, under the *Customs and Inland Revenue Act,* 1881, s. 38, sub-s. 2 (*c*), and the *Customs and Inland Revenue Act,* 1889, s. 11, must be borne by all the appointees rateably according to their respective shares and not by the residuary appointee exclusively.

By a voluntary settlement made the 30th of December, 1864, by *Archer James Croft* (since deceased) and his eldest son, *Archer Bernard Croft,* the surplus moneys arising from the sale of certain hereditaments conveyed in trust for sale by a deed of even date, were settled (after a provision for the payment of a jointure to the mother of the said *Archer Bernard Croft*) upon trust for investment, and then upon trust (in the events which happened) for the said *Archer Bernard Croft* during his life; and from and after his death upon trust for the payment to his wife of any part of the income of the trust fund for her life as he should by deed or will appoint, and subject thereto upon trust, as to the capital and income, for such of his children as he should by deed or will appoint.

Archer Bernard Croft made his will, dated the 24th of September, 1889, and thereby, in exercise of the powers given to him by the said settlement, appointed that the trust funds subject to such settlement should from and after his decease (subject to the jointure payable to his mother under the settlement and to

an annuity by the will appointed to his wife) be held upon trust that the trustees of such settlement should, as soon as might be after his decease, raise two several sums of £5000, and pay one of such sums to his daughter *Amy Elizabeth Gertrude Croft*, and the other to his daughter *Helen Frances Charlotte Croft*, for their absolute benefit respectively; and should also, as soon as might be after his decease or the decease of his mother, whichever should last happen, raise two further several sums of £1000, and pay one of them to his said daughter *Amy Elizabeth Gertrude Croft*, and the other to his said daughter *Helen Frances Charlotte Croft*, for their absolute benefit respectively; and should also, as soon as might be after his decease, out of the said trust premises, raise another sum of £5000, and hold the same upon trust for his son *Archer James Croft*, such sum to vest in interest at the testator's death, but to be payable to his said son when he should attain twenty-one, with a direction for payment of the income to him during his minority; and should, if and when the testator's son, *Guy Glendower Croft*, should attain twenty-one, out of the trust premises raise and pay to him a like sum of £5000; but, if he should die under twenty-one, then that such sum should sink into the trust premises, with a direction that, during the minority of the said *Guy Glendower Croft*, the trustees should, out of the income of the residue for the time being of the trust premises, after raising such of the said sums therein-before directed to be raised as should be raiseable, apply the annual sum of £150 for his maintenance or education. And the testator further appointed that, subject to the trusts aforesaid, the said trust premises subject to the said settlement, and the income thereof, should be held upon trust for the testator's son, *Hugh William Croft*, absolutely if he should survive the testator and attain twenty-one, with a direction that during the minority of the said *Hugh William Croft* the trustees should, out of the income of the said residuary trust premises, apply the annual sum of £150 for his maintenance or education, and accumulate the residue of such income for his benefit. The will contained no direction that any of the sums appointed should be paid free of duty.

The testator, *Archer Bernard Croft*, died on the 18th of

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January, 1891, leaving the five children named in his will surviving him. Of these, *Amy Elizabeth Gertrude Croft* and *Helen Frances Charlotte Croft* had attained twenty-one; but the other three were still infants. The testator's wife and mother were still living. The trust fund subject to the settlement consisted of a sum of £54,255, secured by mortgage and other securities held by the trustees.

Upon the testator's death, the Crown claimed account stamp duty, under the *Customs and Inland Revenue Act*, 1881 (44 & 45 Vict. c. 12), s. 38, sub-sect. 2 (*c*), in respect of the trust fund comprised in the settlement and appointed by the will, as being property passing under a voluntary settlement whereby an interest in such property for life was reserved to the settlor within the meaning of that section as amended by the *Customs and Inland Revenue Act*, 1889 (52 & 53 Vict. c. 7), s. 11.

The question was whether the whole of the duty ought to be borne exclusively by the appointee of the residue of the trust fund, or by all the appointees rateably, according to the amounts of their respective interests.

This was an originating summons taken out by the Plaintiffs, the trustees of the settlement, against the testator's five children, the appointees, to have this question of the incidence of the duty determined by the Court.

Mills, for the Plaintiffs.

Fischer, Q.C., and *Mills*, for the Defendants, the appointees of the specific sums:—

The question is whether each appointee is liable to have the deduction for duty made in respect of the sum appointed to him. We submit he is not. This duty is a primary charge created by the Legislature on the property, and must be satisfied before the beneficiaries can be entitled to anything. It is just as if a mortgage on a fund had been created by a testator and the mortgage money had to be paid before the beneficiaries of the fund could receive anything. There is no provision in this Act, the *Customs and Inland Revenue Act*, 1881, distributing the charge rateably among the appointees in a case of this kind; and in the absence

of any such provision the charge falls on the entirety of the fund. This charge must be paid by the trustees of the settlement, and what remains after satisfying that charge they must distribute in the manner directed by the party having the power of appointment, the real liability to the duty thus being thrown upon the residuary legatee or appointee: *In re Haygarth's Trusts* (1).

[They also referred to the *Customs and Inland Revenue Act*, 1881, ss. 27, 38, 41; and the *Customs and Inland Revenue Act*, 1889, s. 5.]

Badcock, for the Defendant, the appointee of the residue:—

In re Haygarth's Trusts applies only to probate or administration duty. We are dealing here, not with a will, but with a voluntary settlement; and it is under that settlement the appointees are taking, though by nomination in the will; and account duty is being claimed on the settlement under sect. 38, sub-sect. 2 (*c*) of the *Customs and Inland Revenue Act*, 1881, as amended by sect. 11 of the *Customs and Inland Revenue Act*, 1889. The question is, upon whom does the incidence of the duty fall? By the Act the account duty there mentioned is imposed as a new succession duty on voluntary settlements, the intention being that the duty shall be payable by the donee or person taking an interest under the settlement, not by the trustee, though, as a matter of convenience, it is usually collected from the trustee. That it is the intention of the Act that the donee shall pay the duty is, I submit, clear from sect. 41, which provides for the cesser of legacy and succession duties at 1 per cent. on "any legacy, residue, or share of residue" upon which "duty shall have been paid . . . in conformity with this Act." Accordingly, the duty under this Act is substituted for succession duty, and the person to be relieved from succession duty is to pay the new duty. An examination of sub-sects. 2, (*a*), (*b*) and (*c*) of sect. 38 shews that the duty must be paid by the person taking the benefit under the particular disposition. I say, therefore, that each of the specific sums appointed is "property passing under a voluntary settlement" within

(1) 22 Ch. D. 545, 547-8.

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sub-sect. 2 (*c*), upon which duty, under sub-sect. 1, shall be "charged and paid." The fact of the trustee paying the duty in the first instance does not alter the necessity of his deducting it afterwards from the shares which are to go to the beneficiaries. The appointor has not said that the shares are to be paid free of duty, and they therefore must remain subject to the liability. If the Act had not been passed, each of the appointees would of course had to pay succession duty—that is to say, the duty would have had to be paid by the successor himself, who would have taken his share less the amount of duty. The imposition of the account duty in place of the succession duty cannot have the effect of increasing the share each person takes under the appointment; the intention of the Act must have been to make the same persons liable for the account duty as were previously liable for the succession duty. I submit, therefore, that the duty should be distributed rateably over the shares of the whole fund.

Fischer, in reply:—

It is the duty of the trustees to distribute their trust fund in the specific portions in which they have been appointed, and the residuary legatee or appointee is not entitled to have anything until those specific portions have been distributed. The Act charges the duty on the entire estate, and the trustees must pay the duty so charged. There is no provision in the Act that the duty shall be payable rateably, or that it shall be distributable among the parties entitled to portions of the estate.

KEKEWICH, J.:—

The question which has been argued has been presented to me as a question arising under the *Customs and Inland Revenue Act*, 1881; but it does not seem to me really to arise under that Act. Of course, one must look at the Act to see whether there is any provision in the least way interfering with the construction of the will or deed which happens to be in question; here we have to deal with a will exercising a power of appointment. In this Act the Legislature has enacted by sect. 38, sub-sect. 2 (*c*), that property passing under a voluntary settlement and therein described shall be charged with certain duty; and as between

the Crown and the trustees, or as between the Crown and all the parties entitled, the property passing under that instrument pays the duty, and there is an end of the operation of the Act. No one of the parties can say that any particular portion of the property is to be liable; the whole is made liable. The question under the Act is whether the duty is payable only as between the Crown and the entire estate; the further question how, when you come to distribute the entire estate between the parties, it must be adjusted between them in administration, is quite apart from the Act and the rights of the Crown.

The only point, as it seems to me, that can be made on the Act at all is that which was made by Mr. *Badcock*, namely, that by the 41st section there is a relief given from legacy and succession duty of 1 per cent. where the duty assessable under this Act is paid; which indicated, according to his view, that each share is to bear its own burden. I do not think the point is by any means unworthy of consideration; but, nevertheless, I do not mean to refer to it further.

Here I have a testator purporting to exercise a power of appointment among his children; and, as a matter of fact, he gives to one so much, and to another so much, and then he disposes of the residue. Am I in such a case to presume that his intention is to charge the residue with the whole of any duty which happens to be payable under any Act of Parliament? I should have thought clearly not. Is there anything in the will which ought to lead me to that conclusion? There are specific sums given certainly, as if he meant the parties to have those specific sums. Probably he had forgotten all about this Act of Parliament. He may have meant them to have the sums clear; but he has not said so in actual words. I see no more reason for concluding that he intended them to have them clear than that he intended the residuary legatee or appointee to pay the whole duty. I think there is really no expressed intention on the matter at all; and I must therefore consider what is the general intention of persons dealing with property in this way. What is that general intention? The Legislature intervenes and says this property is subject to so much per cent. duty. I think I must presume, in the absence of words to the

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contrary, that a testator intends that each share of his estate shall bear its aliquot part of the duty. As I have already observed, the testator here has not said so, but he has not said the contrary; and where there is nothing said one way or the other, the proper rule is to make each share bear its own burden. The burden is not a charge created by the testator or any person interested, but by the Legislature; and it is a paramount charge subject to which all the parties take. I therefore hold that the duty must be borne rateably by the appointees of the specific sums and of the residue respectively.

Solicitors: *Hunters & Haynes.*

G. I. F. C.

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COMPANY—*Alteration of Memorandum—Objects—Extension to New Business—Alteration of Name of Company—Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1.] A marine insurance company applied under the provisions of the Companies (Memorandum of Association) Act, 1890, for the sanction of the Court to resolutions altering the company's deed of settlement, by extending the objects of the company so as to combine therewith businesses in the nature of life, fire, and accident insurance connected with marine risks. There was evidence that such businesses were commonly transacted

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by marine insurance companies at the present time, and that they could conveniently or advantageously be combined with the existing business of the company:—*Held*, following *In re Foreign and Colonial Government Trust Company* ([1891] 2 Ch. 395), that the proposed alteration ought to be sanctioned only on the condition that the name of the company should be altered in such manner as should be approved of by the Judge in Chambers, so as to indicate to persons dealing with the company the extended nature of the company's business. *In re* ALLIANCE MARINE ASSURANCE COMPANY - - - - 300

2. —— *Alteration of Memorandum—Objects—Extension to New Business—Powers of the Court—Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub-s.* 5, *clause* (*d*)] In exercising the powers conferred by sect. 1, sub-sect 5, clause (d), of the Companies (Memorandum of Association) Act, 1890, the Court should regard as convenient and advantageous those things which experience and the opinions of traders reasonably shew to be of that character.—A company formed mainly for the purpose of insuring against risks by explosion of steam boilers, applied for the sanction of the Court to resolutions altering the company's memorandum of association by very largely extending the objects of the company in such a way as to combine with its existing business other business of an independent though not unconnected character There was evidence shewing that in the view of the persons best qualified to form an opinion the proposed extension was to the advantage of the company:—*Held*, that the proposed alteration of the memorandum of association ought to be sanctioned, but upon the terms that the name of the company should be altered, in such manner as should be approved of by the Judge, so as to indicate the extensive change in the character of the business which was being effected, that the new objects should not have practical effect until subsisting policies had expired or the holders thereof had given their assent, and that provisions of the altered memorandum which appeared to the Court to transgress the reasonable limits of combination should be modified or omitted. *In re* NATIONAL BOILER INSURANCE COMPANY - - - - 306

3. —— *Alteration of Memorandum—Objects—Extension of Business—Dissentient Minority—Conditions—The Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub-ss.* 3, 5 (*a*), (*d*).] The memorandum of association of a company stated one of its objects to be, to invest in the "stocks or obligations of British, Foreign, or Colonial Governments, States, provinces, or municipalities, or of railways or other public undertakings, guaranteed by any British, Foreign, or Colonial Government, State, province, or municipality." Owing to changes in the money market, and competition with other similar companies, the money of the company could no longer be advantageously invested in the better class of securities originally authorized; and as the business of the company must either be very much restricted, or carried on at considerable risk, the Court was asked to sanction alterations in the memorandum giving (1.) a

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power to create a security in favour of debenture stock holders, and (2.) a power "to invest on the security of, or otherwise to acquire and hold, any bonds, debentures, debenture stock, obligations, mortgages, or securities of any companies or corporations formed under British, foreign, or Colonial Law" Of the debenture stock holders who had expressed any opinion on the proposed alterations, eight-ninths assented, and one-ninth dissented:—*Held*, that the first alteration fell within sect. 1, sub-sect. 5 (*a*), as it enabled the company to carry on its business more efficiently; that the investment in the class of securities specified in the second alteration was a business which, within sect. 1, sub-sect. 5 (*d*), under existing circumstances, might conveniently or advantageously be combined with the business of the company; and that the proposed alterations ought to be sanctioned, on condition that the company would undertake to give the present debenture stock holders a floating charge on its assets within four months, and to alter its name within three months, by adding some further words, so that persons dealing with it might not be misled into supposing that its investments were limited to Government securities. *In re* GOVERNMENTS STOCK INVESTMENT COMPANY (No. 2) - 597

4. —— *Alteration of Deed of Settlement—Confirmation by Court—Deed of Settlement modified by Private Act—Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *ss.* 1, 3.] A reversionary interest society was constituted in 1823 by a deed of settlement, which provided that the object and business of the society should be to purchase reversionary interests of every description in real and personal property (except advowsons and next presentations), and also to purchase life or other partial interests the reversions expectant on which might have been previously purchased by the society, and to purchase life policies of insurance. In 1845 a private Act was passed, which empowered the society to increase its capital, and this was done in 1846. In 1857 another private Act was passed, which provided that the society might purchase life and other partial interests of every description in real and personal property, whether vested or contingent, so as the interests to be so purchased should be either to determine or to take effect upon the decease of a person or persons, except interests in advowsons and next presentations to ecclesiastical benefices, but including rents and annuities of every description given or granted for a life or lives, or for a term or terms of years determinable upon the dropping of a life or lives; and that the society might lend money as well upon real security as upon the security of any interest in real or personal property which the society was authorized to purchase by the deed of settlement or by this Act. In 1880 the society was registered as a company with limited liability, under the Companies Act, 1862 In 1891 the society, by a special resolution, resolved to add the following clause to the deed of settlement: "That the society may from time to time borrow and raise money for the purposes of the society's business, and secure the repayment thereof by bonds, debentures, debenture stock, or mortgage debentures, perpetual or

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determinable (payable to bearer or otherwise), and with or without a trust deed, and for this purpose may mortgage or charge the undertaking and all or any of the property of the society, including its capital for the time being uncalled; provided that the total indebtedness of the society under this clause shall not at any time exceed the amount of the paid-up capital of the society for the time being." The proposed alteration did not affect any of the provisions of the private Acts:—*Held*, that, notwithstanding the private Acts, the constitution of the society was such that the provisions of the deed of settlement could be altered under the Companies (Memorandum of Association) Act, 1890.—*Held*, also, that the proposed addition came within sub-sect. 5 (*a*) of sect. 1 of the Act, and the Court accordingly confirmed it. *In re* REVERSIONARY INTEREST SOCIETY, LIMITED - - - - - - 615

5. —— *Director—Liability—Principal and Agent—Qualification Shares—Indemnity—Insurance against Loss—Promoter—Contract between Director and Promoter—Secret Agreement—Secret Profit—Misfeasance—Breach of Trust—Loss to the Company—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 165—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.] A., being requested by the promoter of a projected company to become a director, agreed to do so upon the terms that, if he should at any time desire to part with the shares which he was to take in order to qualify him as director, the promoter should purchase them from him at the price which he should pay for them. The company was subsequently formed, and A. became a director, took the qualification shares, and paid for them at par out of his own money, and from time to time acted as director; but he never disclosed to his co-directors or to the company the existence of his agreement with the promoter. He afterwards resigned his office of director, and subsequently to his resignation the promoter at his request paid to him the sum which he paid for the shares, and accepted a transfer of them. At that time the shares were valueless in the market. In the winding-up of the company the liquidators took out a summons under sect. 10 of the Companies (Winding-up) Act, 1890 (a section substituted for the similar section, 165, of the Companies Act, 1862), asking that A. might be declared guilty of misfeasance or breach of trust in relation to the company in entering into the agreement with the promoter, and might be ordered to pay to the liquidators the sum received by him from the promoter, with interest:—*Held* (reversing Kekewich, J.), that, having regard to A.'s position as director of, and therefore agent for, the company, whatever benefit or profit accrued to him under the indemnity constituted by his secret agreement with the promoter belonged to the company, and that the retention by him of the proceeds of the indemnity occasioned a loss to the company for which he was accountable, with interest, upon the principle of *Hay's Case* (Law Rep. 10 Ch. 593) and *Pearson's Case* (5 Ch. D. 336). *Bentinck* v. *Fenn* (12 App. Cas. 652) distinguished. *In re* NORTH AUSTRALIAN TERRITORY COMPANY. ARCHER'S CASE C.A. 322

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6. —— *Debenture-holders — Condition — "Floating Security" — "Charge" — Receiver — Solicitor's Lien—Title Deeds—Priority—Mortgagor and Mortgagee.*] A limited company issued mortgage debentures charging all its undertaking and property, one of the conditions of the debentures being that they were to rank pari passu as a first charge and to be a "floating security," but so that the company should "not be at liberty to create any mortgage or charge in priority to the said debentures." There was no trust deed for further securing the debenture debt. Subsequently an order appointing a receiver was made in a debenture-holders' action, the company being ordered to deliver up to such receiver all documents relating to the property comprised in the debentures. The company's title deeds were then in the possession of their solicitor, who refused to deliver them up, claiming a lien for costs incurred by the company to him as their solicitor prior to the appointment of the receiver:—*Held*, that so long as the debentures continued to be a "floating security"—that is, until the appointment of the receiver—they did not interfere with the company's business being carried on in the ordinary way, and the debenture-holders could not prevent the company's solicitor, employed by them in the usual course of their business, from acquiring the ordinary solicitor's lien; and that, inasmuch as that lien was a right given by the general law, and not a "charge," or, at any rate, not a charge "created" by the company, the solicitor was not precluded by the condition of the debentures from asserting his lien in priority to the debenture-holders. A "floating security" discussed. *In re Horne & Hellard* (29 Ch. D. 736) considered. *In re Snell* (6 Ch. D. 105) and *In re Mason & Taylor* (10 Ch. D. 729) distinguished. BRUNTON v. ELECTRICAL ENGINEERING CORPORATION 434

7. —— *Debenture-holders—Winding-up—Receiver and Manager—Official Liquidator—Right to Custody of Books and Documents—Companies Act*, 1862, *ss.* 23, 25, 26, 27, 32, 43, 56, 58, 67, 100, 154, 155, 156—*Companies (Winding-up) Act*, 1890, *ss.* 4, *sub-s.* 3, 7, 8, *and Sched.* 1, *cl.* 3.] A company issued debentures which were a charge on the whole of the company's property and assets, including the uncalled capital. In an action by the holder of the debentures a receiver and manager was appointed. An order was afterwards made for the winding-up of the company. The company had ceased to be carried on as a going concern:—*Held*, that the official liquidator was entitled to the custody of such of the books and documents of the company as related to its management and business and were not necessary to support the title of the holder of the debentures.—By the order appointing the receiver and manager it was directed that all books and documents relating to the property and assets of the company should be delivered to him; and he accordingly took possession and retained the custody of them. Upon an application by the official liquidator:—*Held*, that it was competent to the Court to vary the order from time to time as seemed expedient for the purposes of the action and the winding-up, and,

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accordingly, that an order might be made for delivery of certain of the books and documents to the liquidator on an undertaking by him to produce them to the receiver or the Plaintiff. ENGEL *v.* SOUTH METROPOLITAN BREWING AND BOTTLING COMPANY - - - - 442

8. —— *Winding-up—Official Receiver—Provisional Liquidator—List of Contributories—Companies (Winding-up) Act,* 1890 (53 & 54 *Vict. c.* 63)—*Companies (Winding-up) Rules,* 1890, *r.* 83.] The term "liquidator," mentioned in rule 83 of the Companies (Winding-up) Rules, 1890, includes the Official Receiver when acting as provisional liquidator, and therefore the list of contributories of a company settled by the Official Receiver while acting as provisional liquidator of a company which has been ordered to be wound up by the Court is rightly settled. *In re* ENGLISH BANK OF THE RIVER PLATE 391

9. —— *Winding-up — Official Receiver—Appointment of Liquidator—Determination of Creditors and Contributories—Result of Meetings—"May"—Discretion of the Court—Unanimous—Companies (Winding-up) Act,* 1890 (53 & 54 *Vict. c.* 63), *s.* 6, *sub-ss.* 1, 3—*Companies (Winding-up) Rules,* 1890, *r.* 63.] Under sect. 6, sub-sect. 1 (*a*), of the Companies (Winding-up) Act, 1890, the right of the majority of the creditors and contributories present at the statutory meetings, to have their nominee appointed liquidator, in the place of the Official Receiver, is subject to the control of the Court, and the Court, in the exercise of its discretion, may refuse to appoint such nominee, or any liquidator, and can leave the winding-up in the hands of the Official Receiver. —The "unanimous" determination of the creditors and contributories, mentioned in rule 63, sub-rule 2, of Companies (Winding-up) Rules, 1890, refers to the unanimity of all the creditors and contributories at the meetings, and not to unanimity in the result of the two meetings. *In re* JOHANNISBERG LAND AND GOLD TRUST COMPANY - - - - - - 583

10. —— *Winding-up—Petition—Locus Standi of Petitioner—Contributory—Calls in Arrear.*] A petition for the winding up of a company, presented by a shareholder who is in arrear in the payment of calls upon his shares, ought not to be absolutely dismissed; but as a general rule the Court will not hear the petition until the calls have been paid, or, at any rate, paid into Court. *In re Diamond Fuel Company* (13 Ch. D. 400) explained.—A petition for the winding-up of a company having been presented by two shareholders, who were in arrear in the payment of calls, the Court declined to hear the petition except upon the undertaking of the Petitioners to submit to any order which the Court might think fit to make as to the payment of the calls.—The undertaking having been given, the petition was heard and was dismissed with costs, and the Court then enforced the undertaking by ordering each Petitioner to pay the calls due upon his shares. *In re* CRYSTAL REEF GOLD MINING COMPANY - - - - - - 408

11. —— *Winding-up—Proof — Secured Creditor—Realization of Security—Deficiency—Application of Proceeds in Discharge of Interest*

COMPANY—*continued.*

subsequent to Winding-up—Right to Prove for Balance—Rule in Bankruptcy—Judicature Act, 1875, *s.* 10—*Bankruptcy Act,* 1883, *ss.* 9, *sub-s.* 2, 168; *Sched.* 2, *r.* 9—*Bankruptcy Rules,* 1886, *rr.* 73-75.] A secured creditor of a company which is in liquidation, who has exhausted his security without satisfying his debt, is not entitled to apply the proceeds of the security in payment first of interest subsequent to the winding-up, and then in reduction of principal, and to prove in the winding-up for the balance of the principal. His proof must be limited to what was due for principal and interest at the commencement of the winding-up after deducting therefrom proceeds of sale or realization received in respect of the security.—He is entitled, however, to set off profits realized from the security since the winding-up against interest accrued during the same period.—*In re Talbott* (39 Ch. D. 567) not followed.—*Ex parte Penfold* (4 De G. & Sm. 282) followed. *In re* LONDON, WINDSOR AND GREENWICH HOTELS COMPANY. QUARTERMAINE'S CASE 639

—— Liability of directors—Statute of Limitations—Stale demand - - - 154
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—— Winding-up — Industrial and provident society - - - - 604
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COMPENSATION—Copyholds taken by railway company - - - 73, 75 n.
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—— Infant—Repudiation of settlement - 396
See INFANT. 2.

CONDITION — Continuing — Charitable gift—Retention of fund in Court - 95
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See VENDOR AND PURCHASER.

CONFLICT OF LAWS—*Bill of Exchange—Over due Inland Bill indorsed Abroad—Claims by different Holders in Absence of Payer—Indorsee with Valid Title under Foreign Law—Rights against prior Holder with Equitable Title in England—Bills of Exchange Act,* 1882 (45 & 46 *Vict. c.* 61), *ss.* 29 (*sub-s.* 2), 36 (*sub-s.* 2), 72 (*sub-s.* 2).] A bill of exchange, drawn and accepted by English firms, and payable in England to the order of X. & Co., was indorsed in Norway by X. & Co. to the order of M., who indorsed it in blank and handed it in Norway to S., as agent for A., an Englishman residing in London, and an English firm of A. & Co. carrying on business in London (in which A. & J. were partners). While the bill was in the hands of S., and still current, it was seized in execution under a judgment obtained in Norway by a creditor of J., and, after the bill had become overdue, it was sold by public auction to M. The seizure and sale took place in the ordinary course of Norwegian law, under which a perfect title was conferred by the sale on M. freed from all equities —that law not recognising the English doctrine that the purchaser of an overdue bill only gets such title as his vendor had, or any difference as to extent of negotiability between a current and an overdue bill. M. sold the bill in Sweden (the law of which is the same for this purpose as that of

CONFLICT OF LAWS—*continued.*

Norway) to K., who bought in the ordinary course of business, without knowledge of any infirmity of title to the bill. K. sent the bill for collection to his agents in England, the N. Bank. Before presentation for payment A. and A. & Co. obtained an ex parte injunction restraining the drawers and acceptors from paying the bill, and after presentation A. and A. & Co. obtained an ex parte injunction against the N. Bank, restraining them from parting with the bill. By arrangement, the proceeds of the bill were paid into Court, and the N. Bank and all the Defendants except K. were dismissed from the action:—*Held*, by Romer, J., that sub-sect. 2 of sect. 36 of the Bills of Exchange Act, 1882, which provides, that "where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had," is only declaratory of the English law when that law applies; and that, the action being in reality to recover the bill, the only question being between two persons each claiming against the other to be entitled to hold the bill and as holders to obtain payment, and no question being raised by or affecting the payers, the case was not within the proviso to sub-sect. 2 of sect. 72 of the Bills of Exchange Act, 1882, that "where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom:"—*Held*, by Romer, J., and on appeal, that the effect of the transactions in Norway must be determined by Norwegian law, and that, as according to that law their effect was to give to M. a complete title to the bill and its proceeds free from all equities, the title of K. prevailed over that of A. and A. & Co.—*Lebel* v. *Tucker* (Law Rep. 3 Q. B. 77) distinguished. ALCOCK *v.* SMITH - - - C. A. 238

2. —— *Jus gentium—Company—Debentures—Charge on Unpaid Capital—Scotch Arrestment—Priority—Notice.*] The U. Bank held debentures issued by the Q. Company, which was domiciled in Queensland, charging the unpaid capital in respect of shares in the Q. Company. After such capital had been called up, but before it had been paid, the A. Company commenced an action against the Q. Company in Scotland for damages, and arrested the calls on the Q. Company's shares held in Scotland; the holders of such shares had no notice of the debentures. The Q. Company was ordered to be wound up in Queensland and also in England. An order was made in the English winding-up restraining the A. Company from prosecuting the action in Scotland, but without prejudice to the security, if any, which they had acquired upon the amounts payable on the Scotch shares by the proceedings in Scotland; and an order was also made by the Court of Session in Scotland recalling the arrestments and restraining the proceedings in Scotland, but subject to the further order of the Court.—It was in evidence that under the Scotch law the arrestment was equivalent to an assignment with notice to the debtor, and took priority over an earlier assignment without notice; and further, that according to the Scotch law and the jus gentium as administered in Scotland, the Scotch arrestments would, under the circumstances, have priority over the assignment by the debentures, notwithstanding the fact that the creditor was domiciled in Queensland and the place of payment was in England, whatever the law of those countries might be:—*Held* (affirming the decision of North, J.), that the question of priority on the proceeds of the Scotch shares must be regulated by the law of Scotland, and that this Court was bound to have regard not only to the municipal law of Scotland, but to the administration of the jus gentium by the Scotch Courts. The A. Company was, therefore, held to have the first charge on such proceeds. *In re* QUEENSLAND MERCANTILE AND AGENCY COMPANY. *Ex parte* AUSTRALASIAN INVESTMENT COMPANY. *Ex parte* UNION BANK OF AUSTRALIA - - - - C. A. 219

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See PATENT. 2.

—— Validity—Contract to stifle prosecution 173
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CONTRACT—*Validity—Public Policy—Stifling a Prosecution—Implied Condition.*] The secretary of a building society, who had made default in accounting for money paid to him and was threatened by the society with a prosecution for embezzlement, applied for assistance to the Plaintiffs, who were his relatives, and they gave a written undertaking to the society to make good the greater part of the debt due from the secretary, the expressed consideration being the forbearance of the society to sue the secretary for the amount for which the Plaintiffs made themselves responsible, and in pursuance of that undertaking they gave two promissory notes and some title deeds as collateral security to the society. The Plaintiffs in giving the undertaking were actuated by the desire to prevent the prosecution, and that was known to the directors of the society; but no promise was made that there should be no prosecution.—The society brought an action on the promissory notes in the Queen's Bench Division, and the Plaintiffs brought an action in the Chancery Division to set aside the promissory notes and the collateral securities on the ground that they were made for an illegal consideration. The Queen's Bench action was transferred to the Chancery Division, and the two actions tried together:—*Held* (affirming the decision of Vaughan Williams, J.), that it was an implied term of the agreement that there should be no prosecution; that the agreement was therefore founded on an illegal consideration, and void; and that the society could not recover on the promissory notes or enforce the securities; and, the society not opposing, they were ordered to be delivered up to the Plaintiffs. JONES *v.* MERIONETHSHIRE PERMANENT BENEFIT BUILDING SOCIETY - - - C. A. 173

—— By lunatic before lunacy - - 236
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—— Consideration—Past services - - 104
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—— Will—Trust to invest in freehold, copyhold, or leasehold - - - - 279
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COPYHOLD—Taken by railway company—Compensation - - - 73, 75, n.
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COSTS—Infringement of trade-mark—Innocent purchaser - - - - 630
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COVENANT—To employ resident porter - 427
See LANDLORD AND TENANT.

DEBENTURE—"Floating security"—Lien of solicitor of company - - 434
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—— Liability—Secret profit—Qualification 322
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See TRADE-MARK. 3.
DISTRIBUTIONS, STATUTE OF—*Will—Partial Intestacy—Provision for Widow—Intestates' Estates Act*, 1890 (53 & 54 *Vict. c.* 29)—"*Testamentary Expenses*" *in sect.* 6.] The Intestates' Estates Act, 1890, does not, like the Statute of Distributions (22 & 23 Car. 2, c. 10), apply to cases of partial intestacy.—The phrase "testamentary expenses" in sect. 6 is a slip in the drafting of the Act, and means expenses of letters of administration and of administration generally. *In re* TWIGG'S ESTATE. TWIGG *v.* BLACK - 579

EASEMENT—Light - - - 47, 611
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ELECTION—Infant—Settlement—Repudiation—Compensation - - - 396
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ENFRANCHISEMENT—Copyholds taken by railway company—Compensation 73
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EQUITABLE ASSIGNMENT—*continued.*
—— Share in patent—Registration - 104
See PATENT. 2.
EXECUTOR—*Legacy—Specific Assets, Appropriation of—Incomplete Transaction—Deposit of a Mortgage Deed.*] An executor has power, even though no express authority be given him for that purpose in the will, to agree with a legatee to appropriate a specific portion of the estate to him.—An executor, who had no special authority for that purpose, agreed with one of the residuary legatees to appropriate to him a mortgage as part of his share, and for that purpose handed to him the mortgage deed, but executed no transfer of the mortgage to him. At the time when this was done the sum secured by the mortgage was not more than the estimated amount of the legatee's share in the residue; but by reason of the subsequent loss of some of the assets the residuary estate was greatly reduced, and the other residuary legatees claimed the mortgage as part of the testator's assets:—*Held* (reversing the decision of Kekewich, J.), that the appropriation was complete, and that the legatee could not be deprived of the mortgage. *In re* LEPINE. DOWSETT *v.* CULVER - - - - C. A. 210
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See COMPANY. 9. [583
—— r. 83 - - - - - 391
See COMPANY. 8.
GUARDIAN—Infant—Rights of father - 292
See INFANT. 1.

HUSBAND AND WIFE—*Married Women's Property Act*, 1870 (33 & 34 *Vict. c.* 93), *s.* 10—*Policy of Life Assurance—Wife and Children—Joint Tenants.*] A policy was taken out on the life of the assured for the benefit of his wife and children, pursuant to the Married Women's Property Act, 1870.—The assured died, leaving a widow and five children:—*Held*, that the widow and children took the moneys payable under the policy as joint tenants. *In re Seyton* (34 Ch D. 511) followed.—The dictum in *In re Adam's Policy Trusts* (23 Ch. D. 525) not followed. *In re* DAVIES' POLICY TRUSTS - - - - - 90

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—— Infant's settlement—Repudiation—Compensation—Restraint on anticipation 396
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See TRUSTEE. 1.

INDUSTRIAL AND PROVIDENT SOCIETY—*Company — Winding-up — Jurisdiction — Industrial and Provident Society—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 1, 2, 3 —*Industrial and Provident Societies Act*, 1876 (39 & 40 *Vict. c.* 45), *s.* 17.] A society registered under the Industrial and Provident Societies Act, 1876, is not within the Companies (Winding-up) Act, 1890, and cannot be wound up under that Act.—Such a society can only be wound up by the proper County Court under the provisions of the Act of 1876 and the County Court Acts. *In re* LONDON AND SUBURBAN BANK - 604

INFANT—*Guardian—Appointment of Guardian by Mother — Father, rights of, as Guardian — Father's Misconduct—Removal of Father—Statutory Power—Intention—Jurisdiction—Guardianship of Infants Act*, 1886 (49 & 50 *Vict. c.* 27), *s.* 3, *sub-s.* 2, *s.* 13.] The provisional appointment or nomination by a mother, during the father's lifetime, under sect. 3, sub-sect. 2, of the Guardianship of Infants Act, 1886, of guardians of her infant child after her death, should be, in form, an appointment of guardians to act "jointly with the father"; and upon an application, under that sub-section, after her death, to confirm the appointment made by her, the Court can make an order under the Act in that form only, provided it is satisfied by the evidence that the father is "unfitted to be the sole guardian"; though, under its general jurisdiction, which is preserved by the concluding words of the sub-section, and also by sect. 13, the Court may, in a proper case, altogether displace the father.—A mother, separated from her husband, by her will, dated in 1890, appointed, "so far as she might be able," two guardians of her infant daughter, those guardians not being expressed to be appointed "jointly with the father" pursuant to the statutory power given to a mother by sect. 3, sub-sect. 2, of the Guardianship of Infants Act, 1886. Upon the death of the mother, the infant, being then eleven years of age, applied, under that sub-section, by one of the testamentary guardians as next friend, to have the appointment confirmed by the Court, and the father therefore displaced, misconduct being alleged against him.—*Held*, that the testamentary appointment, though wrong in form, must be treated as having been intended to be made under the statutory power; and accordingly an order was made confirming the appointment jointly with the father, the Court being satisfied, upon the evidence, that the father was "unfitted to be the sole guardian." *In re* G—— (AN INFANT) 292

2. —— *Settlement—Election—Married Woman —Restraint on Anticipation.*] An ante-nuptial settlement was made in 1879, the wife being under age. The settlement contained a covenant by the husband and wife to settle her after-acquired property. She was, among other benefits, given certain life interests without power of anticipation. She was divorced. She brought an action to avoid the covenant. Before trial, she married again:—*Declared*, that if she elected to avoid the covenant, her interests in other property under the settlement, and also in a house settled by a deed of even date recited in the settlement, ought to be impounded to compensate those who lost by her election; but that the declaration was not to apply during the existing coverture to the income she was restrained from anticipating. HAMILTON *v.* HAMILTON - - - - - 396

—— Settled Estates Act—Sanction of Court to sale - - - - - 412
See SETTLED ESTATES ACT.

INJUNCTION—Breach of covenant in lease—Employment of resident porter - 427
See LANDLORD AND TENANT.

—— Libel—Jurisdiction - - - 571
See LIBEL.

INSURANCE, LIFE—Married Women's Property Act—Wife and children - 90
See HUSBAND AND WIFE.

INTEREST—*Minerals wrongfully taken—Compensation—Trespass—Money had and Received—Account—Claim for Interest made on further Consideration—Delay*—3 & 4 *Will.* 4, *c.* 42, *s.* 29—1 & 2 *Vict. c.* 110, *ss.* 17, 18.] By the decree made in this suit in 1870, it was declared that the Defendants S. H. and R. F., and the estate of the deceased Defendant W. H. F., were answerable for all minerals gotten or removed from under the Plaintiffs' farm; and an inquiry was directed what quantities of minerals had been so gotten or removed, and it was ordered that the value at the pit's mouth of all minerals so gotten or removed, with just allowances for carriage, but none for getting, should be certified. The decree was silent as to interest, no claim for interest being made at the hearing.—After the decree the Defendants S. H. and R. F. died, and the suit was continued, so far as the inquiry was concerned, against their representatives.—The Official Referee having, in December, 1889, reported the value at the pit's mouth of the minerals taken to be £9028 6*s.*, the Plaintiffs, upon the further consideration of the suit in 1891, claimed to be entitled to damages in the nature of interest on that amount on the ground that the action was in the nature of an action of trover or trespass de bonis asportatis within sect. 29 of 3 & 4 Will. 4, c. 42: —*Held*, that the action must be treated as an equitable action to recover the benefits that the Defendants or their respective estates had received from the wrongful taking of the minerals belonging to the Plaintiffs, and not as an action of trover or trespass; and that, although, according to the settled practice in the case of such an equitable action, the Plaintiffs might, at the hearing, have been allowed interest on the value of the minerals wrongfully taken, yet, the Plaintiffs not having claimed interest at the hearing and the decree being silent as to interest, it was too late to claim it for the first time twenty years after the date of the decree.—Decision of Stirling, J., affirmed.—In an equitable action to re-

INTEREST—*continued.*

cover from the estate of a deceased person the profits he has received from a wrongful act, such as taking coal belonging to the Plaintiff, the Court will, at the trial, make the estate liable, not only for the amount of profits actually received, but also for interest thereon at 4 per cent. from the death of the wrongdoer: *Duke of Leeds* v. *Lord Amherst* (14 Sim. 357, 367; 2 Ph. 117). PHILLIPS *v.* HOMFRAY - - C. A. 465

2. —— *Money payable at a Time depending on a future contingent Event—Time depending on Verification of Accounts—3 & 4 Will. 4, c. 42, s. 28—Rate of Interest under the Statute.*] Where the instrument under which a sum of money is payable makes the day of payment depend upon a future contingent event, such time is not a time certain within the 28th section of the 3 & 4 Will. 4, c. 42, and such sum does not carry interest unless there has been a demand for payment with notice that interest would be claimed. —The Plaintiffs and Defendants, who were competing railway companies, entered into a joint traffic agreement. The accounts of each company were to be exchanged and balanced every month, and 75 per cent. of the balance appearing on the accounts was to be paid on or before the 15th of the following month to the company to which it was due. The rest of the balance, if agreed on, was to be paid with the 75 per cent. in the next month; but if the balance-receiving company failed to verify the accounts for two months after the date of exchange, the payments on account were to cease till the verification was completed. —A dispute arose between the Plaintiffs and Defendants on the question whether the traffic on the Defendants' line between L. and S. ought to be brought into the joint account. The accounts, however, continued to be exchanged without including this traffic; but the Plaintiffs, who were the balance-receiving company, fell very much into arrear with the verification. The Plaintiffs brought an action claiming a declaration that the L. and S. traffic ought to be brought into the joint account. The Defendants resisted this claim, and also pleaded that the agreement was ultra vires and altogether void. The Court decided that the agreement was valid, and that the Plaintiffs were entitled to have the L. and S. traffic brought into the joint account, and directed an account on that footing. It appeared from the evidence that the real reason why the Plaintiffs did not verify the accounts was, not the dispute between the companies, but the pressure of business in the Plaintiffs' office:—*Held* (reversing the decision of Kekewich, J.), (1.) that the Plaintiffs were not entitled to interest on the balance either in the general account or in the account of the L. and S. traffic, as no time certain was fixed for payment in the agreement, nor any demand for payment or notice of claim for interest made within the 28th section of the 3 & 4 Will. 4, c. 42; and (2.) that the Plaintiffs having themselves made default in verifying the accounts, they could not claim interest on the ground that they had been prevented by the Defendants from ascertaining the amount due, and from demanding payment and interest.—*Merchant Shipping Company* v. *Armitage* (Law Rep. 9 Q. B. 99) followed.—

INTEREST—*continued.*

Duncombe v. *Brighton Club and Norfolk Hotel Company* (Law Rep. 10 Q. B. 371) not followed. —*Semble*, where interest is payable under the 3 & 4 Will. 4, c. 42, s. 28, the Court is not bound to give interest at the rate of 5 per cent., but will follow the current rate of interest at the time. LONDON, CHATHAM AND DOVER RAILWAY COMPANY *v.* SOUTH EASTERN RAILWAY COMPANY [C. A. 120

—— Payment of, out of capital—Liability of directors - - - - 154
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—— Proof in winding-up—Secured creditor 639
See COMPANY. 11.

INTESTACY—Partial—Intestates' Estates Act
See DISTRIBUTIONS, STATUTE OF. [579

JOINT TENANT—Policy for benefit of wife and children - - - - 90
See HUSBAND AND WIFE.

JURISDICTION—Appointment of guardian of infant - - - - 292
See INFANT. 1.

—— Libel—Injunction - - - 571
See LIBEL.

—— Master in Lunacy—Writ of attachment 459
See LUNATIC. 2.

JUS GENTIUM—Conflict of laws - - 219
See CONFLICT OF LAWS. 2.

LANDLORD AND TENANT—*Specific Performance—Covenant to employ Resident Porter—Building let in Flats—Injunction.*] The lease of a residential flat, in a block of buildings let in flats to several tenants, contained a covenant by the lessors to employ a resident porter, who was to act as the servant of the tenants of the several rooms in the block, and to be constantly in attendance in such block, either by himself, or, in his temporary absence, by some trustworthy assistant.—The lessors appointed a cook and his wife to reside upon the premises, and permitted the cook to carry on his business as such, and provide boys and charwomen to do his duties of porter; and for some months he was engaged four hours daily, with the assent of the lessors, as chef at a neighbouring club:—*Held*, that the lessors had committed a breach of the covenant, to prevent the continuance of which breach the lessee of the flat was entitled to a perpetual injunction, upon the ground that the lessors had never appointed a porter at all within the meaning of the covenant. RYAN *v.* MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCIATION - 427

—— Fixtures - - - - - 415
See MORTGAGE. 3.

LANDS CLAUSES ACT—*Railway Company—Copyholds—Enfranchisement—Compensation—Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 95, 96, 97.] In 1873 a railway company took copyhold land for the purposes of its undertaking, and erected cottages and works thereon. In November, 1875, a deed of conveyance by the copyholder, under sect. 95 of the Lands Clauses Consolidation Act, was entered on the Court Rolls. No steps having been taken by the

LANDS CLAUSES ACT—*continued.*

company to obtain enfranchisement, the lord, in 1887, required the company to enfranchise and pay him compensation. By the custom of the manor a fine of two years' improved annual value was payable on the death of lord or tenant, and a fine of three years' improved annual value on alienation:—*Held*, by Stirling, J., that the compensation was to be assessed according to the annual value of the land as improved by the company's works:—*Held*, by the Court of Appeal, that as under sects. 96 and 97 an obligation on the company to procure enfranchisement and an obligation on the lord to enfranchise, arose at the expiration of one month from the entry by the company, or of three months from the inrolment of the conveyance, whichever should first happen, the compensation must be assessed as at that period, without regard to the subsequent improvements made by the company; but that the lord was entitled to the fines which had become payable after that period, and before steps had been taken for enfranchisement, such fines being assessed according to the improved annual value of the land. LOWTHER *v.* CALEDONIAN RAILWAY COMPANY - - - C. A 73

2. —— *Railway Company—Copyholds—Enfranchisement — Compensation — Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 95, 96.] Where copyholds are taken by a railway company, the compensation to which the lord is entitled for his manorial rights is to be assessed as on the expiration of a month after the entry by the company, and not as at the time when the enfranchisement is completed. *In re* MARQUIS OF SALISBURY AND THE LONDON AND NORTH WESTERN RAILWAY COMPANY - - - 75, n.

LEGACY—Appropriation of specific assets—Power of executors - - - 210
See EXECUTOR

LIBEL—*Injurious to Trade—Placard—Circular — Injunction — Jurisdiction.*] The Court has power to restrain by injunction on interlocutory motion the publication of placards and circulars containing statements injurious to trade where the Court is satisfied upon the facts and evidence before it that such statements are false.—The decision in *Bonnard* v. *Perryman* ([1891] 2 Ch. 269) discussed. COLLARD *v.* MARSHALL - 571

LICENSE—To work mines—Exclusive [or non-exclusive - - - - 475
See MINE.

LIEN—Solicitor—For costs—Debenture holders of company - - - - 434
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—— Solicitor—For costs—Partition action 101
See SOLICITOR.

LIGHT—*Devise of House with Windows to one and of Land adjoining to another—Right of Light to Windows over the Land.*] The law as laid down by *Palmer* v. *Fletcher* (1 Lev. 122), and the subsequent cases of *Allen* v. *Taylor* (16 Ch. D. 355), and *Rigby* v. *Bennett* (21 Ch. D. 559), applies to devises by will as well as to contemporaneous grants by deed.—So where a testator being seised in fee in possession of a house with windows and of an adjoining field over which the right of light required for the windows passed, devised the house to one, and the field to another:—*Held*, that the right to light over the field passed to the devisee of the house, and that the devisee of the field was not entitled to block up the windows of the house. PHILLIPS *v.* LOW - - 47

2. —— *Extinguishment of Easement.*] Where a new building has been erected on the site of an ancient building, in order to entitle the owner of the new building to access of light, it is necessary to shew that some defined part of an ancient window admitted access of light through the space occupied by a defined part of an existing window. PENDARVES *v.* MONRO - - 611

LIMITATIONS, STATUTE OF—*Company—Winding-up—Liability of Directors—Payment of Interest out of Capital — Stale Demand.*] By the articles of association of a company incorporated in 1868, it was provided that interest on the money paid up on the shares should be paid to the shareholders until otherwise determined by the directors; and that no dividend or bonus should be payable except out of the profits. No profits were made by the company; but the directors paid interest to the shareholders out of the capital of the company until 1878, when the Board of Trade interfered, and the directors ceased to pay interest. B. was a director from 1869 till his death in 1883. In 1886, the company was wound up; and in 1889 the liquidator commenced an action against the personal representatives of B., seeking to make his estate liable for the money paid as interest to the shareholders out of capital while he was a director:—*Held* (affirming the decision of North, J.), (1.) that the payment of interest out of the capital when there were no profits was ultra vires, notwithstanding the clause in the articles of association; (2.) that the directors, being in the position of trustees, the Statute of Limitations was no bar to the action; and (3.) that there was no such delay, either before or after the commencement of the winding-up, as to render the claim of the liquidator a stale demand in the view of a Court of Equity. The Defendants were, therefore, held liable to make good out of B.'s estate the payments made during the period of his directorship, with interest at 4 per cent. *In re* SHARPE. *In re* BENNETT. MASONIC AND GENERAL LIFE ASSURANCE COMPANY *v.* SHARPE - - - - C A. 154

LIQUIDATOR—Appointment of—Discretion of Court - - - - 583
See COMPANY. 9.

—— Provisional liquidator—Official receiver 391
See COMPANY. 8.

—— Right to custody of deeds and documents—Receiver of debenture holders - 442
See COMPANY. 7.

LOCKE KING'S ACT - - - - 450
See WILL. 4.

LUNATIC—*Alleged Lunatic — Alleged Lunatic found of Sound Mind—Costs of Inquiry—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 90, 94, 98, 109.] A petition was presented by a husband for an inquiry into the mental condition of his wife, and, after a hearing lasting seventeen days, it was found by a majority of the jury that the wife was at the time of the inquisition of sound mind and

LUNATIC—*continued.*

capable of managing herself and her affairs.—The expenses of the inquiry were very heavy, and the Petitioner's costs were more than he was in a position to pay. His wife was entitled to large property, part of which was not comprised in the marriage settlement. The Petitioner applied to the Court to exercise its discretion under sect. 109 of the Lunacy Act, 1890, by directing that all the costs of the proceedings should be paid by his wife. The wife made a counter application that her costs should be paid by the Petitioner.—THE COURT (Lindley, Bowen, and Kay, L.JJ.) *held* upon the evidence that there were sufficient grounds to justify the Petitioner in instituting the inquiry; and that, under the circumstances of the case, the wife must pay her own costs, and the Petitioner ought to receive two-thirds of the amount of his costs of all the proceedings (to be taxed as between party and party) out of the property belonging to the wife, and not comprised in the marriage settlement.—Observations upon the principles to be applied by the Court when exercising the discretion as to costs conferred upon it by sect. 109 of the Lunacy Act, 1890 *In re* CATHCART - - - - C. A. 549

2. —— *Alleged Lunatic—Writ of Attachment—Compulsory Order for Examination—Jurisdiction of Master—Lunacy Act*, 1890 (53 & 54 *Vict c* 5), *s.* 94, *sub-s.* 2—*Lunacy Act*, 1891 (54 & 55 *Vict. c.* 65), *s.* 26, *Sched.*] A Master in Lunacy who is holding an inquisition of lunacy has power to order a writ of attachment to issue against an alleged lunatic for the purpose of enforcing his attendance; but in ordinary cases he ought to refer the matter to the Court in Lunacy. *In re* B—— (AN ALLEGED LUNATIC) - C. A. 459

3. —— *Contract before Lunacy—Contract Executed or Executory—Vesting Order—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 135.] M., by writing, agreed to sell his leasehold premises and his business to T. and G. for a sum of which £2535 was to be paid at once, the residue, £3050, at the end of five years. Possession was given, and the £2535 duly paid. After this M., who resided abroad, was found lunatic abroad, and a curator was appointed, with authority to receive the £3050. T. and G., and the curator, petitioned that on payment of the £3050 and interest to the curator the leasehold premises might be ordered to vest in T. and G.:—*Held*, that under the Lunacy Act, 1890, sect. 135, an order could be made vesting the leasehold in T. and G., such order to be dated and drawn up after payment of the £3050 to the curator. *In re* PAGANI. *In re* PAGANI'S TRUST - - - C. A. 236

4. —— *Sale of Lunatic's Real Estate—Consideration—Perpetual Rent-charge—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 117, 120.] Under sects. 117 and 120 of the Lunacy Act, 1890, the Court has power to sanction a sale of a lunatic's real estate in consideration of a perpetual rent-charge, and will exercise such power if the evidence shews that such a sale will be for the benefit of the lunatic. *In re* WARE - C. A. 344

5. —— *Trustee—Vesting Order—Reduction of Number of Trustees—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 135, 136; *Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 32.]

LUNATIC—*continued.*

Where one of four trustees of a will had been found lunatic by inquisition, the Court made an order vesting his estate in the other three trustees, although the number of trustees was thereby diminished. *In re* LEON - - C. A. 348

MACHINERY—Payment for by instalments—Mortgage - - - - 415
See MORTGAGE. 3.

MASTER IN LUNACY—Jurisdiction—Writ of attachment - - - - 459
See LUNATIC. 2.

MEMORANDUM OF ASSOCIATION—Alteration of - - - 300, 306, 597
See COMPANY. 1, 2, 3.

MERGER—Tenant for life of fund—Executor of reversioner - - - 227
See POWER.

MINE — *Deed — Construction — Reservation of Right to get Minerals—Right, whether Exclusive—Setting aside Lease.*] Earl G. and Viscount T., the Plaintiff's predecessors in title, having a general power of revocation and new appointment over lands of which they were respectively tenant for life in possession and tenant for life in remainder, by a deed of exchange in 1783 appointed and granted the lands to the Defendant's predecessor in title in fee, saving and reserving nevertheless to Earl G. and Viscount T., their heirs and assigns, full and free liberty to get the coal and minerals which should be found within the lands. The minerals were never worked under this reservation by the Plaintiff or his predecessors in title. In 1865 the then owner of the lands demised the coal under part of them to persons whose interest became vested in the Defendants B. & B.; and in 1877 the Defendant H., who had succeeded to the ownership of the lands, demised the coal under another part to the Plaintiff. Some years after this the Plaintiff first became aware of the reservation in the deed of 1783, and brought his action to establish his right to the minerals, to restrain the Defendants from working them, and to have the lease of 1877 rectified or set aside:—*Held*, that the reservation in the deed of 1783 did not operate as an exception of the minerals, but only as a grant by the Defendants' predecessor in title of a right to work them; that there was nothing to shew that this right was to be exclusive; and that, therefore, it did not prevent the landowner from working them, provided he did not disturb the grantee in any working which the grantee was carrying on; and that the Defendants, therefore, had not infringed the Plaintiff's rights:—*Held*, further, that the lease of 1877 could not be rectified, as there was no common mistake, and that it could not be set aside, as the Plaintiff was not prepared to give up possession of the property comprised in it.—Decision of Vaughan Williams, J., affirmed. DUKE OF SUTHERLAND *v.* HEATHCOTE - - C. A. 475

—— Minerals wrongfully taken—Interest 465
See INTEREST.

MISTAKE—Mutual—Setting aside lease - 475
See MINE.

MORTGAGE—*Chose in Action—Priority—Notice to one of several Trustees—Inquiry of Trustees—Death of only Trustee who has Notice.*] S., one of the two trustees of a will, knew of the execution of a marriage settlement by which the share of a woman in a personal fund held on the trusts of the will was settled. E., the other trustee, had no notice of it. Afterwards the husband and wife proposed to mortgage this share, not disclosing the settlement. The intending mortgagees inquired of S. and E. about incumbrances. S. returned an evasive answer. E. replied that he was not aware of any dealing with the share. The mortgagees, without making further inquiry of S., advanced their money and gave formal notice of their security both to S. & E. S. died, and F. was appointed trustee in his room. E. and F. having obtained judgment for the execution of the trusts of the will, the trustees of the settlement claimed to have the share paid to them free from the mortgage:—*Held* (affirming the decision of Stirling, J.), that the trustees of the settlement were entitled to the share in priority to the mortgagees; for as at the time when the mortgagees took their security there was a trustee who had notice of the settlement, and from whom the mortgagees might have acquired knowledge of it, the settlement, according to the authorities, had during the life of that trustee priority over the mortgage, and this priority could not be lost by the death of the trustee, all other circumstances remaining the same. *In re* WYATT. WHITE *v.* ELLIS - - - C. A. 188

2. —— *Equitable Mortgagee—Memorandum of Deposit—Six Months' Notice—Interest in Lieu of Notice.*] An equitable mortgagee by deposit of title deeds of land accompanied by a memorandum of deposit is not entitled to six months' notice before he is bound to accept a tender of the amount due, nor to six months' interest in lieu of notice.—In the case of a regular mortgage deed with a proviso for redemption the just inference is that the loan on mortgage is intended to be of a permanent character, and that the parties intended that after default the mortgagee should be entitled to a six months' notice; but where the just inference from the transaction is that the mortgage is merely temporary, as is the case where the mortgage is in the usual form by deposit merely, then it is not reasonable to infer that the parties intended that notice should be given. FITZGERALD'S TRUSTEE *v.* MELLERSH 385

3. —— *Fixtures—Trade Machinery—Contract for Erection of Machinery to be paid for by Instalments—Machinery to remain Property of Vendors till fully paid for—Prior Mortgage of Premises including Machinery thereafter erected—Failure of Mortgagor to pay Instalments of Purchase-money—Right of Vendor to remove Machinery.*] A limited company, who were lessees of a colliery, on the 29th of December, 1883, mortgaged it to their bankers, "together with all fixed engines, boilers, shafting, gearing, machinery, machines, and other fixtures . . . now standing and being, or hereafter to stand or be," upon the mortgaged premises.—On the 2nd of July, 1889, the company entered into an agreement with some engine-makers for the erection by them at the colliery of a machine. The purchase-money was to be

MORTGAGE—*continued.*

paid by monthly instalments, commencing at a specified date, and it was provided that, if the payments were not made regularly, the vendors should have the right at once to call upon the company for immediate payment in full of the whole of the balance of the purchase-money then remaining due. It was also stipulated that, immediately on the vendors receiving payment of the balance, the machine should become the property of the company, but that until fully paid for it should remain the property of the vendors. The machine was erected accordingly, and it commenced working in August, 1890. It was of the nature of a trade fixture. Two instalments of the purchase-money were paid by the company, but they failed to make any further payments.—In February, 1891, the bankers brought an action to enforce their security, and a receiver was appointed, who took possession of the colliery. In March, 1891, the company resolved on a voluntary winding-up, and a supervision order was made in May:—*Held*, that the stipulation that the machine should remain the property of the vendors until it was fully paid for was valid, and that, notwithstanding the inclusion in the mortgage deed of machinery to be after erected, the company could not confer on their mortgagees a better title to the machine than they had themselves:—*Held*, consequently, that, the receiver desiring to give up possession of the colliery, the vendors were entitled to remove the machine.—*Semble*, that no property in tenant's fixtures vests in the landlord before the termination of the tenant's term. CUMBERLAND UNION BANKING COMPANY *v* MARYPORT HEMATITE IRON AND STEEL COMPANY. *In re* MARYPORT HEMATITE IRON AND STEEL COMPANY [415

4 —— *Foreclosure absolute—Practice—Receipt of Rents after Day fixed for Redemption—Form of Affidavit.*] When a mortgagee receives rents after default has been made in payment of the principal and interest on the day fixed for redemption, but before the affidavit of such default is sworn, an order for final foreclosure will nevertheless be made without any further account. —*Constable* v. *Howick* (5 Jur. (N.S.) 331) followed. *Ross Improvement Commissioners* v. *Usborne* (W. N. (1890) 92) not followed. Form of affidavit in support of an application for foreclosure absolute discussed. NATIONAL PERMANENT MUTUAL BENEFIT BUILDING SOCIETY *v.* RAPER [54

5. —— *Foreclosure—Receiver and Manager—Practice.*] Where a receiver is appointed at the instance of a mortgagee over property on which the mortgagor carries on business, the receiver cannot be directed to manage the business unless the business is in express terms or by implication included in the security.—An hotel-keeper who was about to rebuild the hotel, and had an agreement for the grant to him of a lease for eighty years when he had rebuilt it, charged "the said building agreement, and all the premises comprised therein, and the hotel and buildings to be hereafter erected as aforesaid, and the lease so to be granted as aforesaid," with the repayment of a sum borrowed, subject to a prior charge, and agreed to execute to the lender, as

MORTGAGE—*continued.*

soon as the lease was granted, a valid second mortgage, which should be in such form and contain such powers, covenants, and provisions as the solicitor or counsel of the mortgagee should advise or require. The hotel was built, and the mortgagor carried on business on the property, but did not execute any formal mortgage. The mortgagee brought an action for sale or foreclosure, and moved for a receiver. Kekewich, J., appointed a receiver to receive the rents of the property and manage the business of the hotel carried on there. The Defendant appealed from this order, so far as it appointed a manager:—*Held*, that the security did not charge the goodwill or business, and the provision that the mortgage should be in such form and contain such stipulations as the mortgagee should require did not enlarge the subject of the charge, but only provided for perfecting it; and that the Court could not appoint a manager. The appeal was, therefore, allowed.—*Campbell* v. *Lloyd's, Barnett's, and Bosanquet's Bank* ([1891] 1 Ch. 136, n.), *Makins* v. *Percy Ibotson & Sons* ([1891] 1 Ch. 133), and *Truman & Co* v. *Redgrave* (18 Ch. D. 547), explained. WHITLEY *v.* CHALLIS [C. A. 64

—— Foreclosure—Sale out of Court—Form of order - - - - 92
See PRACTICE. 2.

NAME OF COMPANY—Alteration of - 300
See COMPANY. 1.

NOTICE—Assignment of chose in action—Scotch arrestment—Conflict of laws - 219
See CONFLICT OF LAWS. 1.

OFFICIAL RECEIVER—Winding-up of company
See COMPANY. 2. [390

OVERDUE BILL OF EXCHANGE—Negotiated abroad—Priority - - - 238
See CONFLICT OF LAWS. 1.

PARTIES—Adding defendant—Patent action
See PRACTICE. 1. [487

PARTITION ACTION — Change of solicitor — Lien on deeds - - - 101
See SOLICITOR.

PARTNERSHIP—*Articles—Expiration or Determination of Partnership by Effluxion of Time—Continuance of Business without Fresh Arrangement—Application of Provisions in Articles to Partnership at Will.*] A and B. carried on business under articles of partnership which contained a clause providing that "within three months after the expiration or determination of the partnership by effluxion of time" B should have the option, to be signified within three months after the determination of the partnership, of purchasing A.'s share in the business.—After the expiration of the term created by the articles of partnership, A. and B. continued to carry on the business without making any fresh arrangement:—*Held*, that the provisions of the clause in the original articles giving B. the option of purchasing A.'s share remained in force, and were applicable to the partnership at will carried on by them after the expiration of the original term.

PARTNERSHIP—*continued.*

—*Neilson* v. *Mossend Iron Company* (11 App. Cas. 298), *Cox* v. *Willoughby* (13 Ch. D. 863), and *Yates* v. *Finn* (13 Ch. D. 839), discussed. DAW *v.* HERRING - - - - - - 284

2. —— *Dissolution—Practice—Receiver and Manager—Arbitration Clause—Stay of Proceedings—Jurisdiction—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.] The mere fact of dissolution of a partnership does not give one partner an absolute right, as against his co-partners, to have a receiver appointed of the partnership business.—Articles of partnership entered into by the Plaintiff and Defendant provided that all doubts, difficulties, or divergences that might arise between the partners during the course of the partnership, or at its liquidation or its total or partial dissolution, should be resolved and adjusted by friendly arbitration. The term of the partnership had expired, and it was continued at will. The Plaintiff brought an action for dissolution, and moved for the appointment of a receiver and manager. The Defendant moved for a stay of proceedings under sect. 4 of the Arbitration Act, 1889:—*Held*, that the Court had jurisdiction while appointing a receiver to stay all proceedings in the action except for the purpose of carrying out the order for a receiver.—*Compagnie du Sénégal* v. *Woods* (W. N. (1883) 180; 53 L. J. (Ch.) 166) followed. PINI *v* RONCORONI - - - - - - - 633

PATENT—*Amendment of Specification—Practice—Leave to Amend—Decision of Comptroller—Date when Amendment considered made—Pending Action for Infringement—Patents, Designs, and Trade Marks Acts*, 1883, *ss.* 18-21; 1888, *s.* 5] On the 19th of May, 1890, an application by C. for leave to make certain specified amendments in the specification of a patent to which C. was entitled was heard before the Comptroller, who, on the 9th of June, gave the leave asked for, but upon the condition that C. should not take any legal proceedings against A. (who was opposing the amendment) in respect of any infringement committed before the 1st of January, 1884. C. had during the argument assented to this condition. On the 11th of June C. commenced an action against A. for infringements subsequent to 1884. On the 30th of June the Patent Office asked C. for an undertaking in the terms of the condition, and on the 9th of July C. signed one and sent it to the office. The specification was actually amended on the 26th of August:—*Held*, by the Court of Appeal, affirming the decision of Chitty, J., that, as the condition imposed by the Comptroller had been assented to, and after the leave to amend given on the 9th of June nothing remained to be done by C., the specification was to be treated as duly amended on that day; that the action on the amended specification was therefore properly brought on the 11th, though the amendment had not been actually made; and that sect. 18, sub-sect. 10, of the Patents, Designs, and Trade Marks Act, 1883, did not apply so as to prevent the actual completion of the amendment by reason of the pendency of an action for infringement. ANDREW *v.* CROSSLEY. CROSSLEY *v.* ANDREW - - - C. A. 492

PATENT—*continued.*

2. —— *Co-owners—Equitable assignment of a Share—Registration—Documents of Title, Custody of—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 23, 85, 87, 90—*Patents Rules*, 1883, *rr.* 65, 68, *Form L.—Contract—Consideration—Past Services.*] An equitable assignment of a patent or a share or interest in it may be put upon the register.—A. and B, joint owners of certain patents, wrote to C. as follows: "In consideration of your services as the practical manager in working both our patents . . . . we hereby agree to give you one-third share of the patents, the same to take effect from this date." A. and B. afterwards deposited the letters patent with C. to assist him in effecting a sale of the patents, which however did not take place. C. registered the above letter, and claimed to retain possession of the letters patent as a co-owner of a third share therein:—*Held* (affirming the decision of Romer, J.), that sect. 85 of the Patents, Designs, and Trade Marks Act only excludes notices of trusts; and that the letter was an immediate equitable assignment of an interest in the patent, not defective for want of consideration, and was properly entered on the register *In re* CASEY'S PATENTS. STEWART *v.* CASEY C. A. 104

3. —— *Validity—Provisional Specification—Variation from Complete Specification—Nature of Invention—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 5, *sub-s.* 3, 26] It is since the Patents, Designs, and Trade Marks Act, 1883, no less than before, an essential condition of a good patent that the provisional specification should describe the true nature of the invention, and that the invention there described should be the same as that claimed in the complete specification; and non-compliance with the condition is a ground for revocation of the patent.—The dictum of Halsbury, L.C., in *Vickers* v. *Siddell* (15 App. Cas. 496) applied.—The patentee of an invention for tapping beer-barrels, and preventing waste and leakage, described his invention in the provisional specification as a plug screwed into the barrel end with a valve, and spring, and guide to keep the valve in its place. In the complete specification he added a description of a gauze strainer to keep impurities from escaping into the tap. It was proved that the gauze strainer was the only thing really novel or useful in the invention:—*Held* (affirming the judgment of Kekewich, J.), that the provisional specification did not describe the true nature of the invention, and that the patent was invalid NUTTALL *v.* HARGREAVES - - C. A. 23

—— Action for infringement—Adding defendant who made the machine - - 487
See PRACTICE. 1.

PATENT RULES, 1883, rr. 65, 68, Form L. 104
See PATENT. 2.

PETITION—Winding-up—Locus standi of petitioner—Arrear of calls - - 408
See COMPANY. 10.

POLICY OF INSURANCE—Married Women's Property Act - - - 90
See HUSBAND AND WIFE.

POWER—*Release of—Tenant for Life—Power to Appoint among Children—Death of Child Intestate*

POWER—*continued.*

—Right to Transfer of Deceased Child's Share—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 52.] A father, who was tenant for life under his marriage settlement, had power to appoint among his children, and in default of appointment the fund was to go to all the children equally, the shares to be vested at twenty-one or marriage. There were issue of the marriage three sons: one died an infant; the other two attained twenty-one; but one of them died a bachelor and intestate. The father took out administration to the last-mentioned son, and executed a deed releasing his power of appointment, and then took out a summons calling on the trustee of the settlement to transfer one moiety to him:—*Held* (1.), that the release of the power was valid and that the father was entitled to the son's reversionary interest as his administrator; (2), that inasmuch as the father's life interest and the son's reversion were held by the father in different rights, there was no merger, and that so long as the father's life interest subsisted the fund ought to remain in the hand of the trustee of the settlement; but (3.) that on the father's executing a surrender of his life interest he was entitled to have one moiety of the fund transferred to him.—*Smith* v. *Houblon* (26 Beav. 482) followed; *Cunynghame* v. *Thurlow* (1 Russ. & My. 436, n.) not followed. *In re* RADCLIFFE. RADCLIFFE *v.* BEWES - C. A. 227

PRACTICE—*Parties—Adding Defendant—Action for Infringement of Patent—Application by maker of Machine used by Defendant—Rules of Supreme Court*, 1883, *Order XVI., r.* 11.] The Plaintiff, the patentee of a machine, brought an action against the Defendant for using a machine which he alleged was an infringement of his patent. M, the maker and patentee of the Defendant's machine, applied to be added as a defendant, alleging that a judgment in the action would injure him, and that the present Defendant would not efficiently defend the action:—*Held* (reversing the decision of the Vice-Chancellor of the County Palatine of Lancaster), that M., not being directly interested in the issues between the Plaintiff and Defendant, but only indirectly and commercially affected, the Court had no jurisdiction to add him as a defendant. MOSER *v* MARSDEN [C. A. 487

2. —— *Sale of Property—Sale out of Court—Reserved Biddings and Remuneration of Auctioneer to be fixed by Judge—Form of Order—Declaration as to Persons entitled—Rules of Supreme Court*, 1883, *Order LI., r.* 1A.] In a foreclosure action an order was made for the sale of the mortgaged property by the Plaintiffs out of Court, but the reserved biddings and the remuneration of the auctioneer were to be fixed by the Judge, and the proceeds of sale were to be paid into Court by the Plaintiffs.—The Court prefaced the order with the declaration, required by rule 1A of Order LI. when the proceedings are "altogether out of Court," that the Court was satisfied by the evidence that all persons interested in the estate to be sold were before the Court. CUMBERLAND UNION BANKING COMPANY *v.* MARYPORT HEMATITE IRON AND STEEL COMPANY - 92

PRACTICE—*continued.*

—— Appeal—Hearing respondent trustee in support of appeal - - - 506
See SETTLED LAND ACT.

—— Costs—Infringement of trade-mark - 630
See TRADE-MARK. 1.

—— Foreclosure—Form of affidavit - 54
See MORTGAGE. 4.

—— Lunacy—Costs of inquiry as to alleged lunacy - - - - 549
See LUNATIC. 1.

—— Partnership—Dissolution—Appointment of receiver - - - - 633
See PARTNERSHIP. 2.

—— Patent action—Amendment of specification—Date of amendment - - 492
See PATENT. 1.

—— Receiver—Mortgage—Manager of business
See MORTGAGE. 5. [64

—— Receiver—Trustee—Remuneration - 59
See TRUSTEE. 2.

PRINCIPAL AND AGENT—Director of company—Secret profit - - - 322
See COMPANY. 5.

PRINCIPAL AND SURETY—*Counter-security given by Debtor to Surety—Right of Creditor to benefit of.*] The proposition that the principal creditor is entitled to the benefit of all counter bonds or collateral security given by the principal debtor to the surety cannot be supported. *Mawer* v. *Harrison*, cited in 1 Eq. C. Ab. p. 93, pl. 5, as the authority for that proposition, is not a decision to that effect. *In re* WALKER. SHEFFIELD BANKING COMPANY *v.* CLAYTON - - - 621

PRIORITY—Assignment of chose in action—Notice—Conflict of laws—Scotch arrestment - - - - - 219
See CONFLICT OF LAWS. 2.

—— Mortgage of chose in action - - 188
See MORTGAGE. 1.

PROMOTER OF COMPANY—Secret agreement with director - - - 322
See COMPANY. 5.

PROOF—Secured creditor—Winding-up—Interest - - - - 639
See COMPANY. 11.

PUBLIC POLICY—Stifling prosecution - 173
See CONTRACT.

RAILWAY COMPANY—*Scheme of Arrangement—Confirmation by Court—Non-assent of Class of Preference Shareholders—Rights "prejudicially affected"—Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *ss.* 6, 10, 12, 15, 16, 17.] *Held*, by the Court of Appeal (affirming the decision of North, J.), that the assent of the statutory majority of a class to a scheme of arrangement under the Railway Companies Act, 1867, cannot be dispensed with under sect. 15, if any existing right of that class is prejudically affected, it being for them and not for the Court to consider whether the scheme gives them such benefits that their rights

RAILWAY COMPANY—*continued.*

on the whole are not prejudically affected. *In re* NEATH AND BRECON RAILWAY COMPANY [C. A. 349

—— Lands Clauses Act—Copyholds—Compensation to lord - - 73, 75, n.
See LANDS CLAUSES ACT. 1, 2.

REAL ESTATE—Devise of—"Effects" - 361
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REASONABLE TIME—Delivery of abstract 313
See VENDOR AND PURCHASER.

RECEIVER—Appointment of trustee—Remuneration - - - - 59
See TRUSTEE. 2.

—— Dissolution of partnership—Stay of proceedings - - - - 633
See PARTNERSHIP. 2.

—— Mortgage—Manager of business - 64
See MORTGAGE. 5.

RECEIVING ORDER—Forfeiture clause in will
See WILL. 5. [11

REDEMPTION—Equitable mortgage—Deposit of deeds—Six months' notice . - 385
See MORTGAGE. 2.

REGISTRATION—Patent - - - 104
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—— Trade-mark - - - - 35, 590
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RELEASE OF POWER—Benefit to donee of power - - - - 227
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RENT CHARGE—Sale of—Lunatic's estate 344
See LUNATIC. 4.

RESCISSION OF CONTRACT—Reasonable time
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RESERVATION—Right to get minerals - 475
See MINE.

RESTRAINT ON ANTICIPATION—Infant's settlement—Repudiation - - 396
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SETTLED ESTATES ACT—*Contract for Sale—Sanction of Court—Infant—Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18), *s.* 16—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 41.] A testator devised real estate to trustees in fee, upon trust "to receive the rents and annual proceeds (including mining royalties, if any) arising from the same, and to invest the same until my son Cyril shall attain twenty-four, or die leaving issue, whichever event shall first happen; and thereupon I declare that my trustees shall stand possessed thereof, and of the rents and proceeds received by them as aforesaid, in trust for the said Cyril absolutely and beneficially." And the testator devised and bequeathed to his trustees the residue of his real and personal estate, upon trust to sell and convert the same into money and to pay and divide the same equally between such of his sons, Isaac, William, and Cyril, as should attain twenty-four, or die under that age leaving issue; and if there should be only one such son, then upon trust for such one son absolutely and beneficially. The will did not contain any power of sale of specifically devised real estate. The son Isaac had attained twenty-one; the sons William and Cyril were both under twenty-one:—*Held*, on the authority of *Liddell* v. *Liddell* (31 W. R. 238; 52 L. J. (Ch.) 207), that, by virtue of sect. 41 of the Conveyancing Act, 1881, the estate devised on trust for the son Cyril was a "settled estate," within the Settled Estates Act, 1877; and that consequently the Court had under the latter Act jurisdiction to sanction a sale of the estate. *In re* SPARROW'S SETTLED ESTATE - - 412

SETTLED LAND ACT — *Mansion-house—Sale—Tenant for Life — Bankruptcy — Mortgagee in Possession—Consent of Court—"Trustee"—Remaindermen—Tenants on Estate—Discretion of Court to allow Sale—Settled Land Act*, 1882, *ss.* 3, 15, 50, 51, 53—*Settled Land Act*, 1890, *s.* 10—*Practice—Appeal—Hearing Respondent Trustee in support of Appeal.*] Upon a petition by a tenant for life of a settled estate, under sect 10 of the Settled Land Act, 1890, for the sanction of the Court to a proposed sale of the mansion-house, the Court may, in a proper case, take a wider view than in the case of a proposed sale of heirlooms, such as in *In re Earl of Radnor's Will Trusts* (45 Ch D. 402).—Sect. 53 of the Settled Land Act, 1882, does not impose a condition affecting the title to the estate sold by the tenant for life, or his right to exercise his power of sale. The section constitutes a direction to the tenant for life as to his duty as trustee in the exercise of his powers; and the non-observance of that direction by disregarding the interests of the parties entitled under the settlement, and so causing pecuniary loss, will expose him to all the liabilities of a trustee. One of his duties in exercising his powers under the Act is, not only to safeguard the interests of the remaindermen, but also to consider, in his double capacity of landowner and trustee, the general interest of the

SETTLED LAND ACT—*continued.*

estate itself, including the interests of the tenants on the estate.—The Settled Land Acts do not in any way fetter the Court in its discretionary power of sanctioning or refusing an application by a tenant for life, under sect. 10 of the Settled Land Act, 1890, for its consent to a proposed sale of the mansion-house; and the Court will not fetter itself by laying down any rules for the exercise of its discretion upon such an application. The object of the Acts is to enable a settled estate to be set free from embarrassment; and the Court will, upon such an application, consider not only the wishes and interests of the tenant for life and remaindermen, but all the circumstances of the case, including the interests of the tenants on the estate.—An old family mansion-house and estate became vested, under a settlement, in a tenant for life, a young man against whom bankruptcy proceedings were pending, and who had mortgaged his life estate to a money-lender who had commenced a foreclosure action and taken possession by a receiver. The tenant for life, who was unable, owing to his impoverished condition occasioned by his extravagant habits, to reside on the estate, entered into a contract, under the Settled Land Acts, for the sale of the entire estate, including the mansion-house, to a purchaser, and applied, under sect. 10 of the Settled Land Act, 1890, for the sanction of the Court to the sale of the mansion-house and demesne lands. It was proved that the contract was a peculiarly advantageous one in point of price, and that the same price could not be obtained by selling the mansion-house and demesne lands, and the rest of the estate, separately; but the application was opposed by all the existing remaindermen (uncles of the tenant for life, and the male issue of some of them), who desired that the mansion-house and demesne lands should be preserved in the family:—*Held*, that the Court, in the exercise of its discretion under the Settled Land Acts, must have regard, not merely to the wishes of the remaindermen, but to all the circumstances of the case; and that those circumstances—including the derelict condition of the estate, the fact of its being in the possession of a mortgagee, and the consequent prejudice to the interests of the tenants on the estate—outweighed the wishes of the remaindermen, and that, therefore, the sale of the mansion-house and demesne lands ought to be sanctioned.—Decision of Stirling, J., reversed.—The rule that a respondent to an appeal cannot be heard by counsel in support of the appellant's case, may be relaxed in favour of a respondent trustee who supports an appeal by a tenant for life, on a petition under sect. 10 of the Settled Land Act, 1890. *In re* MARQUIS OF AILESBURY'S SETTLED ESTATES - - - C. A. 506

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SUCCESSION DUTY—*Voluntary Settlement—Appointment—Death of Settlor—Succession—Stamps—Account Stamp Duty—Specific Appointees—Residuary Appointee—Incidence of Duty—Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-s.* 2 (*c*)—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict. c.* 7), *s.* 11.] C. being, under a voluntary settlement made by him, tenant for life of certain trust funds, with remainder to his children as he should by will appoint, died in 1891, having by his will appointed part of the trust funds in separate specific sums to four of his five children, and the residue to his fifth child The will contained no direction that the specifically appointed sums should be paid free of duty:—*Held*, that the account duty payable in respect of the trust funds on C's death, under the Customs and Inland Revenue Act, 1881, s. 38, sub-s 2 (*c*), and the Customs and Inland Revenue Act, 1889, s 11, must be borne by all the appointees rateably according to their respective shares and not by the residuary appointee exclusively. *In re* CROFT. DEANE *v.* CROFT - - - - 652

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TENDER—*Conditional Tender—Tender under Protest.*] Though a conditional tender is not good, a tender under protest, reserving the right of the debtor to dispute the amount due, is a good tender if it does not impose any conditions on the creditor.—A mortgagor tendered to a mortgagee in possession the balance appearing to be due for principal, interest, and costs, according to an account made out by the mortgagor from documents furnished by the mortgagee, such balance being less than what the mortgagee claimed to be due. The mortgagor stated at the time that he did not admit the correctness of the mortgagee's accounts, and that he intended to take steps to dispute them, and to have the costs taxed. The mortgagee refused to accept the sum tendered. The mortgagor then brought an action to redeem Stirling, J., held that as the acceptance of such a tender would not have prevented litigation, the mortgagee ought not to be deprived of his costs on account of it, and that the ordinary redemption decree against a mortgagee in possession must be made:—*Held*, on appeal, that the tender, as it did not impose any conditions on the mortgagee, was a good tender, and that the mortgagor was entitled to accounts, for the purpose of showing whether it was sufficient in amount, reserving further consideration and costs in case it proved to have been sufficient; the ordinary decree to stand in case the tender was shewn to have been insufficient GREENWOOD *v.* SUTCLIFFE - - C. A. 1

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TRADE-MARK—*Infringement—Innocent Purchaser of small quantity of spurious Goods—Costs of Action.*] Where a retail trader innocently purchases and deals with a small quantity of goods which turn out to be an infringement of a trade-mark, the Court will not as a matter of course order him to pay the costs of an action for infringement of such trade-mark.—*Upmann* v. *Forester* (24 Ch. D. 231) distinguished. AMERICAN TOBACCO COMPANY *v.* GUEST - - 630

2. —— *Registration—Rectification—Combination of Words in common use—Fancy Word—Distinctive brand—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 64, *sub-s.* 1 (*c*), *s.* 74, *sub-s.* 1 (*b*), *sub-s* 2] In 1885 the Plaintiffs, A. Pirie & Sons, were registered as owners of a trade-mark for paper, consisting of the words "Pirie's Parchment Bank." They disclaimed the exclusive right to either of the words "Parchment" or "Bank," which were separately in common use in the trade, and were descriptive of different qualities of paper. The Plaintiffs used this mark for a particular quality of paper, both as a water-mark on the paper itself, and also on the wrappers in which the paper was sold:—*Held*, first, that assuming that the Plaintiffs had not disclaimed the use of the words "Parchment" and "Bank" in combination, but only separately, those words could not be registered as a trade-mark under sect 64, sub-sect. 2 (*c*) of the Patents, Designs, and Trade Marks Act, 1883, not being fancy words or words not in common use. Secondly, that the trade-mark could not be supported as a "brand" under the same clause. Thirdly, that the use of the word "Pirie's" did not bring the trade-mark within clause (*a*) of the same sub-section.—The judgment of Williams, J., affirmed.—*Per* Williams, J.: The word "brand" in clause (*c*) is wide enough to include a water-mark. ALEXANDER PIRIE & SONS *v.* GOODALL - - C. A. 35

3. —— *Registration—Rectification—Distinctive Label—Distinctive Words—Common to the Trade—Addition to Trade-mark—Part of Label—Disclaimer—Name of Owner of Mark—Calculated to Deceive—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64, 73, 74—*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 10, *sub-s.* 3 (*i*).] The company had registered, under the Patents, Designs, and Trade Marks Act, 1883, as their trade-mark, a label consisting of a target on which were two concentric circles, the inner containing certain words, black spots, and letters, and between the inner and the outer circle the words "Smokeless